



Media and Armed Conflict:

Protection of Journalists and Media Facilities under Human Rights Law and International Humanitarian Law

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ABSTRACT

This master thesis gives a comprehensive overview of the protection of journalists and media facilities in times of armed conflict. First, the thesis analyses, which legal regimes are applicable: international humanitarian or human rights law. In conclusion, it suggests a parallel application of both regimes while international humanitarian law is to be regarded as *lex specialis* in the event of an armed conflict. In the case of a discrepancy between norms of the two regulatory complexes, the *lex specialis* maxim solves the inconsistency as an interpretation rule. Thus, the human rights provision is interpreted in the light of the more specific humanitarian law provision. Secondly, the thesis examines the concrete norms under both legal regimes that protect journalists and media facilities. It finds that only human rights norms protect the work of journalists while international humanitarian law protects journalists as civilians and media facilities as civilian objects. In the event, that a (fatal) military attack on journalists or media facilities is justifiable under international humanitarian law, there exists a controversy with the right to life guaranteed in human rights law which is solved by means of the *lex specialis* principle. Finally, the extent of the *de facto* protection of journalists and media facilities in comparison to the assured *de jure* protection is tested. For this purpose, the effective protection of journalists and media facilities in general during the current South Sudan crisis is analysed as well as the protection of female journalists against gender-based rights violations in times of armed conflict. A huge discrepancy between the *de jure* granted protection and the actual protection is found in both cases. Therefore, this thesis stresses the need to adopt new binding international regulations specifically tailored to afford all journalists and media facilities the highest protection possible – especially in times of conflict.

PLAGIARISM DECLARATION

I, Rosalie Seppelt, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AP I	Additional Protocol (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Additional Protocol (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
HRL	International Human Rights Law
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
CIL	Customary International Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
INSI	International News Safety Institute
IRRC	International Review of the Red Cross
IWMF	International Women's Media Foundation
NATO	North Atlantic Treaty Organisation
NIAC	Non-International Armed Conflict
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	UN High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
SPLA	Sudan People's Liberation Army
SPLMA	Sudan People's Liberation Movement/Army-in-opposition

UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNMISS	UN Mission in South Sudan
UNTS	United Nations Treaty Series

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I. INTRODUCTION AND RESEARCH FRAMEWORK

‘Without ... freedom of the press ..., without the free battle of opinions, life in every public institution withers away, becomes a caricature of itself...’

Rosa Luxemburg¹

A. Introduction

Numerous international and non-international armed conflicts currently pose a threat to the protection and the enjoyment of human rights all over the world. Journalists and the media play a crucial role in documenting the often complex conflict events, advocating for human rights and uncovering human rights violations by both state and non-state actors. Free press constitutes a key pillar of democracy, but conflict situations pose a serious threat to the freedom of media and the human rights of journalists. They are endangered not only by direct attacks such as calculated killings and arbitrary detentions, but also by disproportionate restrictions by states. Especially in the event of a conflict, states rapidly justify excessive limitations of the freedom of opinion and expression with the argument of maintaining public security or fighting extremism.²

Despite the importance of free press, the number of attacks against journalists and media facilities increased during the last few decades and some journalists were even forced to abandon countries, which had become too dangerous.³ When looking at the development of the count of deaths, this abandonment should be taken into account. Accordingly, in 2017 the global death toll among journalists was 18 % less than the 2016 figure.⁴ At the same time, the number of female journalists killed in 2017 has doubled since 2016.⁵ Due to these figures, this research examines the situation of

¹ R Luxemburg *The Russian Revolution* 1ed (1961) 71.

² UN Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression, African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information 'Joint Declaration on Freedom of Expression and responses to conflict situations', (2015) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>, accessed 28 May 2018.

³ This has been observed in countries such as Syria, Iraq, Libya or Yemen: Reporters Sans Frontières (hereinafter RSF) 'Worldwide Round-Up of Journalists Killed, Detained, Held Hostage, or Missing in 2017' (2017) 7 available at https://rsf.org/sites/default/files/reporters_sans_frontieres_bilan_2017_en.pdf, accessed 28 May 2018.

⁴ Ibid., 7.

⁵ Ibid., 12.

woman journalists.* Moreover, figures published on World Press Freedom Day in May 2018, show that during the first four months of 2018, 32 journalists were already killed.⁶ In comparison to the same time period in 2017, this indicates an increase of the death toll by over a third.⁷

The right to freedom of opinion and expression is protected under international human rights law (HRL).⁸ Furthermore, journalists are protected against arbitrary killings or detentions during international armed conflicts (IACs) under international humanitarian law (IHL).⁹ Although there are no regulations applicable to non-international armed conflicts (NIACs) explicitly referring to journalists or media facilities, journalists are protected as civilians.¹⁰ Notwithstanding this multi-layered protection, most targeted attacks on journalists and media facilities happen in conflict zones.¹¹ The need for an effective protection of journalist and media facilities has led to the adoption of several soft-law documents by international organisations recently.¹² Nevertheless, it remains disputed what binding legal provisions are applicable during armed conflicts.

B. Problem Statement and Key Research Questions

As noted above, the protection of free press especially during conflict situations is crucial for democracy. Journalists are protected both under HRL and IHL but the

* The terms ‘female journalist’ and ‘woman journalist’ are used interchangeably in this thesis and include all journalists who self-identify as female and woman.

⁶ S Auer ‘World Press Freedom Day: Are journalists increasingly under attack?’ *BBC News*, 3 May 2018 available at <http://www.bbc.com/news/world-43961380>, accessed 28 May 2018.

⁷ Ibid.

⁸ United Nations General Assembly (UNGA), International Covenant on Civil and Political Rights (ICCPR), entry into force 23 March 1976, UN Doc. A/6316 (1966), 999 *UN Treaty Series (UNTS)* 171, art 19.

⁹ International Committee of the Red Cross (ICRC), Additional Protocol (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), entry into force 7 December 1978, 1125 *UNTS* 3, art 79.

¹⁰ A Balguy-Gallois ‘The Protection of journalists and news media personnel in armed conflict’ 2, available at https://www.icrc.org/eng/assets/files/other/irrc_853_gallois.pdf, accessed 28 May 2018, French original ‘Protection des journalistes et des medias en période de conflit armé’ (2004) 86 *IRRC* 37.

¹¹ International Federation of Journalists ‘Time to end Impunity: Journalists and Media Staff Killed in 2017’ (2018) 53 available at http://www.ifj.org/fileadmin/documents/A5_IFJ_Killed_List_Report_2017_V5.pdf, accessed 28 May 2018.

¹² UNGA Resolution ‘The safety of journalists and the issue of impunity’ UN Doc. A/C.3/72/L.35/Rev.1, 13 November 2017 available at <http://undocs.org/A/C.3/72/L.35/Rev.1>, accessed 29 May 2018; Joint Declaration on Freedom of Expression and responses to conflict situations op cit (n2).

applicability of HRL during armed conflicts is highly controversial.¹³ Therefore, the relationship between both legal regimes is examined in order to comprehensively identify all norms applicable to journalists and media facilities in armed conflict. This problem requires a threefold approach reflected in three key research questions.

- (1) What norms of which legal regime are applicable in situations of armed conflict: IHL, HRL or both?
- (2) Which laws, under either IHL or HRL, protect journalists and media facilities during an armed conflict?
- (3) To what extent are journalists and media facilities effectively protected by these legal provisions; is the *de jure* guaranteed protection *de facto* reflected in reality?

Each of these research questions is dealt with in a separate chapter. To date, there is no relevant research linking the questions of the systemic relationship between IHL and HRL to the protection of journalists and media facilities during times of armed conflict. In fact, journalists' rights during armed conflicts as well as the safety of media facilities are only examined with regard to the protection granted under IHL.¹⁴

However, the protection under IHL is neither comprehensive nor universal to all journalists. According to article 79 of the Additional Protocol I (AP I) to the Geneva Conventions (GCs), journalists 'engaged in dangerous professional missions in areas of armed conflict' are considered civilians.¹⁵ Journalists engaged in dangerous professional missions must be distinguished from war correspondents who are granted more extensive rights since they are accredited prisoner-of-war-status should they be taken prisoner.¹⁶ To what extent other journalists or media personnel is protected under IHL is not regulated. Moreover, IHL standards only provide protection against disproportionate or indiscriminate military attacks as well as other acts or threats of violence¹⁷, whereas there are no norms relevant to the work or purpose of the press

¹³ See for an overview D Bethlehem 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 *Cambridge Journal of International and Comparative Law* 180.

¹⁴ For instance, A Balguy-Gallois op cit (n10); I Dusterhöft 'The Protection of Journalists in Armed Conflicts: How can They be Better Safeguarded?' (2013) 29 *Merkourios – Utrecht Journal of International and European Law* 4.

¹⁵ ICRC, AP I op cit (n9) art 79 para 1.

¹⁶ ICRC, Geneva Convention III (GC III) of 12 August 1949 relative to the Treatment of Prisoners of War, entry into force 21 October 1950, 75 UNTS 135, art 4A para 4.

¹⁷ ICRC, AP I op cit (n9) art 51.

and the media, namely, to provide independent journalism. In contrast, HRL contains relevant provisions such as the right to freedom of expression.¹⁸ Additionally, protection under HRL cannot be forfeited as opposed to under IHL, which ceases protection should the individual participate directly in the hostilities.¹⁹

Hence, it is important to establish the linkage between IHL and HRL with regard to the protection of journalists and media facilities to identify the complete legal protection in situations of armed conflict.

C. Scope of Research

The primary focus of the research project is to analyse how the rights of journalists and the safety of media facilities are protected during armed conflict. Mainly, the legal problems that arise in the application of norms from two different legal systems are analysed. Meanwhile, the research also examines the effective application of the legal standards in practice by examining the current conflict in South Sudan and the protection of female journalists. By the means of these examples, it is analysed whether the *de facto* protection of journalists and media facilities equals the guaranteed *de jure* protection. For this purpose, the research analyses international law as well as the relevant regional law, where applicable. Furthermore, relevant jurisprudence and state practice are taken into account.

D. Research Objectives

The research aim is to provide holistic answers to the three key research questions above. In doing so, it is attempted to close the gap within existing legal research. Moreover, another objective is to give a good overview of the problem and a good introduction into the relevant literature, jurisprudence and state practices. The research comprises an analysis of certain current conflict situations with a view to contextualising the law.

E. Methodology

The research methodology is restricted to a thorough analysis of primary and secondary sources concerning the topic. In order to provide a comprehensive

¹⁸ UNGA, ICCPR op cit (n9) art 19.

¹⁹ ICRC, AP I op cit (n9) art 51 para 3.

presentation of and an answer to the key research questions, the primary sources for examining the international law consist of the relevant international treaties concerning both IHL and HRL. If relevant, regional treaties will also be used. When pertinent, international customary law and international case law are cited as primary sources as well.

The secondary sources used comprise broad literature by scholars in forms of books, research documents of international bodies such as the United Nations (UN), journal articles, and where not otherwise accessible, online pieces of academic quality. The method used consists of brief summaries and contextualisation of the cited sources and a critical analysis thereof. On this basis, a personal appraisal of the problem is given.

F. Content Synopsis

Each key research question is dealt with in a separate chapter. To begin with, chapter two broadly examines the validity of human rights during armed conflicts. It analyses the theoretical relationship between IHL and HRL. It gives a brief overview of the key areas of concern within this relationship, including the question of extraterritorial application of human rights treaties and the possibility of derogation provided in certain human rights treaties. Since most current conflicts involve not only state parties but also non-state actors such as rebel groups or terrorist organisations, the law applicable to these NIACs is outlined as a second step within this chapter. While doing so, the focus lies on the validity of HRL during NIACs and the human rights obligations of non-state actors. Consequently, the systemic relationship between IHL and HRL is examined. Chapter two analysis the two advisory opinions by the International Court of Justice, namely the opinions on the ‘*Legality of the Threat or Use of Nuclear Weapons*’²⁰ and on the ‘*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*’²¹. Since both opinions suggest a use of the *lex specialis* principle to solve the systemic relationship between IHL and HRL, this principle is thoroughly examined within the following text of the chapter. A strong application of the *lex specialis* principle, which considers IHL as the special system

²⁰ International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons* (henceforth *Nuclear Weapons Opinion*), Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226.

²¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (henceforth *Wall Opinion*), Advisory Opinion, 9 July 2004, ICJ Reports 2004, 136.

suppressing HRL in total, is juxtaposed with weaker forms of the *lex specialis* principle. Those weaker forms are either applied in the case of a norm conflict between an IHL norm and a HRL norm; or, in the absence of such a conflict, the principle is used to interpret a special norm in the light of a general norm. Principles like proportionality, both in terms of HRL and IHL and military necessity are introduced to illustrate the application of the weakest form of the *lex specialis* doctrine.

Chapter three analyses the legal protection of the rights of journalists and the safety of media facilities during times of conflicts. It places the preceding research of a purely theoretical nature in the context of the protection of journalists and media facilities. First, the chapter examines the scope of the rights granted in HRL. Second, the question whether the right to freedom of opinion and expression has become customary international law (CIL) is outlined. The second part of the chapter focuses on the granting of the human rights to journalists and the protection of media facilities under IHL. An analysis of the definition of ‘journalists’ is provided. Afterwards, the theoretical relationship between HRL and IHL, analysed in chapter two, is now applied to the rights of journalists. Chapter three examines if the IHL is *lex specialis* in this case and if so, in what manner the *lex specialis* principle is to be applied. Moreover, it describes how the rights of journalists are protected during a NIAC. For this purpose, the chapter investigates the scope of protection under CIL. Subsequently, the research outlines the protection of the safety of media facilities. Under certain circumstances, media stations can constitute dual use targets and can therefore be considered a legal target within combat operations.²² Chapter three analyses the legitimacy of such attacks. Within this context, the 1999 NATO bombing²³ of the Serbian state television and radio station and subsequent similar cases are presented and legally discussed.

Chapter four contextualises the preceding legal discussion. The *de facto* reality of the standard of protection of journalists’ rights and media facilities’ safety shall be reflected. First, the current example of the NIAC in South Sudan with focus on the safety of journalists and media facilities since the new outbreak of violence in July

²² Y Sandoz, C Swinarski, B Zimmermann *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions*, ICRC, 1ed (1987) para 636.

²³ UN International Criminal Tribunal for the Former Yugoslavia (ICTY) *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000), available at <http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>, accessed 15 April 2018.

2016 is examined on the basis of a UN report released in February 2018.²⁴ The report is summarised and critical analysis in light of the notions made in the previous chapters is provided. Secondly, the reality of female journalists during armed conflicts is analysed. As mentioned above, the number of women journalists killed doubled in 2017 compared to the previous year. Therefore, the second part of chapter four broaches the issue of gender-based discrimination of women journalists during armed conflicts. Specific gender-based impediments for women to the enjoyment of their rights as journalists are discussed. At this point, the situation of female journalists in crisis areas is also presented using several real-life examples. In doing so, this section demonstrates the difference between the *de jure* protection of journalists and the *de facto* reality of women journalists.

Chapter five, concludes the findings of the minor dissertation. Moreover, the chapter provides an outlook of how the addressed key problems could be handled henceforth and presents recommendations in order to guarantee a more comprehensive and effective protection of all journalists.

²⁴ UN Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis, available at <http://www.ohchr.org/Documents/Countries/SS/UNMISSFeb2018.pdf>, accessed 15 April 2018.

II. INTERNATIONAL LEGAL FRAMEWORK – VALIDITY OF HUMAN RIGHTS DURING ARMED CONFLICT

In addressing the first research question, this chapter is dedicated to presenting which HRL and IHL standards are applicable during the situation of an armed conflict.

A. Differences between IHL and HRL

The provisions of IHL are designed to regulate armed conflicts and are not applicable during times of peace.²⁵ Although, there is no clear definition of what exactly constitutes an armed conflict, it is recognised that an armed conflict exists *at least* when states or organised armed groups are engaged in fighting of some intensity.²⁶ However, due to the lack of a generally accepted definition, it is disputed whether the intensity requirement also applies to IAC.²⁷ While the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* Decision declared that the intensity requirement is ‘applicable to both international and internal armed conflicts’,²⁸ the International Committee of the Red Cross (ICRC) proposes to define an IAC as a ‘resort to armed forces of two or more states’ whereas a NIAC exists only if the ‘armed confrontation [reaches] a minimum level of intensity’.²⁹

Moreover, depending on whether or not the conflict is specified to be of international or non-international character, different norms of IHL are applicable.³⁰ Historically, almost all legal provisions of IHL were drafted to regulate IACs exclusively.³¹ It was only in the 1970s that the regulation of NIACs became of high relevance and Additional Protocol II to the GCs (AP II) was adopted.³² Therefore, part B of this chapter focusses on the application of IHL and HRL norms to NIAC.

²⁵ HP Gasser ‘International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion’ (2002) 45 *GYIL* 150.

²⁶ International Law Association ‘Final Report on the Meaning of Armed Conflict in International Law’ (2010) 2, available at http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf accessed on 3 July 2018;

²⁷ International Law Association *Final Report* op cit 14-19.

²⁸ ICTY, *Prosecutor v Tadić*, IT-94-1-AR72 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

²⁹ ICRC *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (2008) Opinion Paper 5, available at <https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>, accessed on 3 January 2019.

³⁰ O Hathaway, R Crootoft et al. ‘Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law’ (2012) 96 *Minnesota Law Review* 1890, 1891.

³¹ H Strydom (ed) *International Law* 1ed (2016) 375.

³² *Ibid.* 376.

In contrast to IHL, HRL is designed to be universal and it does in general not cease to be applicable during armed conflict.³³ Some treaties contain a derogation clause allowing states to temporarily suspend or restrict the validity of certain rights in the situation of a state of emergency.³⁴ However, even in this case, the treaties provide for a catalogue of indispensable human rights that must continue to be protected.³⁵ Hence, the scope of application of IHL and HRL overlaps immensely in the case of armed conflicts. Thus, it is not surprising that the two legal systems differ both in terms of objective and in terms of their normative design, and that this can lead to tensions in the application.

1. Objectives of IHL and HRL

One of the objectives of IHL is to ‘...alleviate the effects of armed conflict by protecting those not, or no longer taking part in conflict and by regulating the means and methods of warfare’.³⁶ HRL aims to ensure the comprehensive protection of rights of individuals.³⁷ Despite the fact that both legal regimes focus on protecting the rights and freedoms of individuals, they differ significantly in the implementation of this goal.

³³ HP Gasser op cit. (n25) 150.

³⁴ See eg article 4 ICCPR; article 15 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, entry into force 3 September 1953, European Treaty Series 5, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765>, accessed on 4 July 2018; article 27 American Convention on Human Rights (ACHR), Organisation of American States, entry into force 18 July 1978, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm, accessed on 4 July 2018.

³⁵ Article 4(2) ICCPR; article 15(2) ECHR; article 27(2) ACHR. The range of the indispensable rights varies significantly with article 27(2) ACHR granting the most comprehensive protection while article 15(2) ECHR provides the least favourable protection.

³⁶ Council of the European Union ‘Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL)’ (2009) European Union Doc. 2009/C 303/06, 1, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1215\(01\)&from=DE](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1215(01)&from=DE), accessed on 4 July 2018.

³⁷ International Law Commission (ILC), Report of the Study Group ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) UN Doc. A/CN.4/L.682, 14 para 15 (henceforth *Fragmentation Report*), available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, accessed on 4 July 2018.

2. Different Scope of Protection in IHL and HRL

To begin with, HRL treaties oblige their member states to protect all persons under their sovereignty.³⁸ These people are not divided into different categories. In contrast to the scope of HRL, the contracts of IHL make a distinction between combatants, civilians involved in combat operations and the civilian population.³⁹ The civilian population enjoys the highest level of protection while it is restricted for persons who fall under the other two categories. In particular, civilians do not constitute a legitimate target for military attacks, article 51 (2) AP I.

In addition, HRL standards ensure a range of individual rights and freedoms that remain largely unmentioned by the IHL. This is the case, for example, with the right to freedom of expression and assembly.⁴⁰ Furthermore, IHL provisions are usually phrased as prohibitions or commandments as opposed to granting individual rights. Article 51(5)(b) AP I prohibits a military attack that involves a disproportionate loss of life within the civilian population. However, this does not grant a subjective right to life for a single individual, as is the case in the human rights treaties.⁴¹

3. Extra-territorial application of HRL

When it comes to armed conflicts, states often act outside their own territory.⁴² Thus the question arises if they are nonetheless bound by HRL. Some regional human rights conventions oblige their member states to protect the rights of all persons within their jurisdiction.⁴³ According to the European Court of Human Rights this comprises at least the extra-territorial validity in occupied territories.⁴⁴ Article 2(1) ICCPR, on the

³⁸ See eg article 2(1) ICCPR; C Lopes, N Quéniwet 'Individuals as Subjects of International Humanitarian Law and Human Rights Law' in R Arnold, N Quéniwet (eds) *International Humanitarian Law and Human Rights Law – Towards a New Merger in International Law* (2008) 212.

³⁹ D Shelton 'Humanitarian law in the Inter-American human rights system' in E de Wet, J Kleffner (eds) *Convergence and Conflicts – Of Human Rights and International Humanitarian Law in Military Operations* (2014) 367.

⁴⁰ See eg articles 19, 21 ICCPR.

⁴¹ See eg article 3 Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 December 1948 available at <http://www.un.org/en/universal-declaration-human-rights/>, accessed on 4 July 2018; article 6 ICCPR.

⁴² M Sassòli 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in: O Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law – Pas de Deux* (2011) 63.

⁴³ Art 1 ACHR op cit (n34); art 1 ECHR op cit (n34).

⁴⁴ European Court of Human Rights (ECtHR) *Loizidou v Turkey* (Application No 15318/89) Judgment 18 December 1996 para 56, available at [https://hudoc.echr.coe.int/eng#{"fulltext":\["Loizidou%20v%20Turkey"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-58007"\]}](https://hudoc.echr.coe.int/eng#{), accessed on 05.08.2018; ECtHR *Cyprus*

applicability of certain IHL norms from only IACs to include also NIACs retrospectively.⁵² For example, the scope of the second Protocol of the 1980 Convention on Certain Conventional Weapons was amended to include NIACs in 2001.⁵³

In contrast to IHL, which can bind equal parties to an armed conflict, HRL applies to the relationship between a state and an individual.⁵⁴ In general, HRL does not cease to be valid during an armed conflict and states remain obliged to protect human rights.⁵⁵ This precept leads to the second question if and how non-state actors are bound by international law.

2. Which Law binds Non-State Actors During a NIAC

Common article 3 GCs relates to every party to the conflict and AP II sets out certain requirements which non-state actors need to fulfil to be bound by the provisions.⁵⁶ In both cases, armed groups involved in a NIAC have to comply with these IHL provisions as soon as they reach a certain extent of organisation.⁵⁷ The ICTY requires every actor in an armed conflict to be ‘sufficiently organised to confront each other with military means’ in order for IHL to apply.⁵⁸ As far as HRL is concerned, it is still very disputed if non-state actors have concrete human rights obligations but there are more and more scholars arguing for it.⁵⁹ However, in order for HRL to bind non-state actors, it needs to be adjusted to the specific human rights implication caused by armed groups in armed conflicts.⁶⁰

available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-6&chapter=26&clang=en, accessed on 22 July 2018.

⁵² ICTY *Prosecutor v Tadić* op cit (n46) para 126; Sivakumaran op cit (n50) 62, 63.

⁵³ Article 1 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively Injurious or to have Indiscriminate Effects as amended on 21 December 2001, entry into force 2 December 1983, 1342 UNTS 137.

⁵⁴ Sivakumaran op cit (n50) 85.

⁵⁵ ICJ *Wall Opinion* op cit (n21) paras 102-106.

⁵⁶ See art 1(1) AP II op cit (n48).

⁵⁷ M Sassòli op cit (n42) 57-58.

⁵⁸ ICTY *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj* (Trial Judgment) IT-04-84-T (2008) para 60, available at <http://www.icty.org/case/haradinaj/4#tjug.a> accessed on 03 January 2019.

⁵⁹ A Clapham ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (2006) 88 *IRRC* 4691, 494-507; D Matas ‘Armed opposition groups’ (1997) 24 *Manitoba Law Journal* 621, 630-634; L Zegveld *Accountability of Armed Opposition Groups in International Law* (2002) (Utrecht) 38-55.

⁶⁰ M Sassòli op cit (n42) 57.

C. Various forms of the relation between IHL and HRL

There are three different possibilities, of how the systemic relationship between HRL and IHL can be shaped in the event of an armed conflict. The ICJ states the following:

‘As regards to the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of law’.⁶¹

And yet, the ICJ does not explain how to allocate a matter to one or both regulatory systems of law. However, the ICJ proposes a solution of the tension by applying the *lex specialis* principle.⁶² Further approaches to address this systemic relationship include, on the one hand, a full displacement of HRL by IHL in the case of an armed conflict or, on the other hand, a parallel application of both systems with a mutually harmonising interpretation.⁶³ In the following discussion, the approach of the ICJ is critically analysed and a qualification of IHL as a *lex specialis* with regard to HRL is examined.

D. The *lex specialis* Maxim to solve the Systemic Relationship between IHL and HRL

To begin with, this section examines the validity of the *lex specialis* maxim in international law in order that it can be applied to the two bodies of law. In a second step, it analyses the different manifestation of the maxim. Consequently, the *lex specialis* principle is used to solve the tension between IHL and HRL.

1. Validity of the *lex specialis* Principle in International Law

The maxim *lex specialis derogat legi generali* originates from Roman law and constitutes a rule of interpretation at national level relating to the event that two laws of equal rank standardise incompatible legal consequences for the same facts.⁶⁴ The special law takes precedence over the general law, as otherwise it would not have its

⁶¹ ICJ *Wall Opinion* op cit (n21) para 106.

⁶² Ibid; also ICJ *Nuclear Weapons Opinion* op cit (n20) para 25.

⁶³ G Zyberi ‘The jurisprudence of the International Court of Justice and international criminal courts and tribunals’ in E de Wet, J Kleffner (eds) op cit (n39) 400, 401.

⁶⁴ A Lindroos ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’ (2005) 74 *NJIL* 35.

own scope of application.⁶⁵ There is no codification of the *lex specialis* maxim in international law.⁶⁶ However, Grotius⁶⁷ already expressed the idea that the special law prevails over the general law and modern international law⁶⁸ also assumes the existence of the principle of specialty. Accordingly, the *lex specialis* maxim applies at international level to resolve norm conflicts in international law.

2. Scope of the *lex specialis* Maxim in International Law

The international legal system is characterised by fragmentation and decentralization, which means that there is no clear hierarchical relationship between the norms of individual subjects of international law.⁶⁹ This is mainly due to a lack of a universal legislative body at international level.⁷⁰ Thus, there is no uniform definition of the *lex specialis* maxim, but it is applied in different forms.⁷¹ In addition, there are three different constellations of norm conflicts to which the *lex specialis* principle can be applied.⁷² The following explanations deal exclusively with conflicts between the norms belonging to two special branches of international law.

a. The Different Forms of the *lex specialis* Maxim

There are two variants of the *lex specialis* principle, a stronger and a weaker variant.⁷³ The principle is considered to be applied in its strong form when it is used to clarify the relationship between two bodies of law as a whole by means of identifying one of

⁶⁵ Ibid.

⁶⁶ Other than, for instance, the *lex posterior derogat legi priori* maxim (the later law prevails over the earlier law) which is expressed in article 30(2) Vienna Convention on the law of treaties, entry into force on 27 January 1980, 115 UNTS 331, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, accessed on 5 July 2018, the *lex specialis* maxim was not included in the Vienna Convention.

⁶⁷ ILC *Fragmentation Report* op cit (n37) 36 para 59;

⁶⁸ See for an overview: ICJ, most recently *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/.United States of America), Judgment, 27 June 1986, ICJ Reports 1986, 14, para 274; *Fragmentation Report* op cit (n37) 20; MN Shaw *International Law* 7ed (2014) 66; Lindroos op cit (n 64); B Simma, D Pulkowski 'Of Planets and the Universe: Self-contained Regimes in International Law' 17 *EJIL* 485-490; H Thirlway 'The Sources of International Law' in MD Evans (ed) *International Law* 4ed (2014) 113-114.

⁶⁹ Lindroos op cit (n 64) 28.

⁷⁰ *Fragmentation Report* op cit (n37) 10.

⁷¹ Ibid., 65, 66; ILC *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts* (henceforth *ILC Commentaries*) (2001) UN Doc. A/56/10, article 55 available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed on 5 July 2018.

⁷² *Fragmentation Report* op cit (n37) 30, 31.

⁷³ Ibid., 65; ILC *Commentaries* op cit (n71) article 55(5) para 358, 359.

them as a ‘self-contained régime’.⁷⁴ In contrast, the weaker form of the *lex specialis* rule is used to interpret and resolve conflicts between individual norms.⁷⁵

(1) The Concept of ‘Self-Contained Régime’ or ‘Special Regime’

The term ‘self-contained régime’ was used by the ICJ in the *Tehran hostages case* to determine the applicable law and to clarify the relationship of the bodies of law in question.⁷⁶ According to the ICJ, the concept of a ‘self-contained régime’ within the area of international state responsibility law is to be understood as a regulatory complex which conclusively regulates the legal consequences of infringements and does not permit recourse to general international law.⁷⁷ However, the term can also be used in a broader sense for systems or subsystems that provide for their own solutions to problems deviating from the general rules of international law.⁷⁸ In some cases, entire areas of law could be described as ‘self-contained’.⁷⁹ Nevertheless, there is no legal definition of the term ‘self-contained régimes’.⁸⁰ Moreover, it is doubtful, if entire areas of law, for instance HRL, can be categorised as self-contained.⁸¹ Furthermore, it is disputed as to whether an area of international law can be considered completely isolated from general international law.⁸² The study group of the International Law Commission therefore considers the term ‘self-contained régime’ to be misleading and proposed the alternative designation ‘special régime’.⁸³ This term is used below.

⁷⁴ *Fragmentation Report* op cit (n37) 65-67; *ILC Commentaries* op cit (n71) article 55(5) para 358; Simma, Pulkowski op cit (68) 490-92.

⁷⁵ C Johann *Menschenrechte im internationalen bewaffneten Konflikt – Zur Anwendbarkeit der Europäischen Menschenrechtskonvention und des Internationalen Paktes über bürgerliche und politische Rechte auf Kriegshandlungen* (Berlin) (2012) 135.

⁷⁶ ICJ *Case concerning the United States Diplomatic and Consular Staff in Tehran* (United States of America./Iran), Judgment, 24 May 1980, ICJ Reports 1980 3 para 86.

⁷⁷ B Simma ‘Self-contained Regimes’ (1985) 26 *Neth.YIL* 117.

⁷⁸ *Fragmentation Report* op cit (n37) 68.

⁷⁹ *Ibid.*

⁸⁰ Johann op cit (n75) 132.

⁸¹ J Crawford Brownlie’s *Principles of Public International Law* 8ed (2012) 634, 365: ‘Human rights treaties are not a distinct species....’.

⁸² *Fragmentation Report* op cit (n37) 82.

⁸³ *Ibid.*

(2) The *lex specialis* Principle as a Rule for Conflict Resolution or Interpretation

In order to determine the relationship between individual norms, the *lex specialis* maxim either serves to solve norm conflicts or to interpret the norms.⁸⁴ These different applications are based on the fact that a specific rule can either be regarded as a variant of a general rule for the separate case, or on the other hand as a modification that displaces the general rule.⁸⁵ The use of the *lex specialis* principle in its ‘genuine’⁸⁶ sense as a conflict resolution mechanism requires the existence of a conflict of norms.⁸⁷ However, if it is possible to interpret and harmonise the specific rule in the light of the general rule, then there is already a lack of a norm conflict.⁸⁸ In this case, the norms are necessarily applied jointly and the *lex specialis* principle can only be used in its broader sense as a rule of interpretation.⁸⁹ In practice, it is not always possible to clearly define the type of *lex specialis* in question; whether the special law is merely application of the general law or a modification.⁹⁰ In particular, even an interpretation of the special rule as an application of the general rule contains a certain suppression of the latter.⁹¹ For this reason, a clear distinction between the two cases seems artificial and can be omitted.⁹²

b. Effects of the Different Forms of the *lex specialis* Maxim on the relationship between IHL and HRL

The relation between the norms of the two regulatory complexes IHL and HRL differs considerably, depending on whether the stronger or the weaker variant of the *lex specialis* principle is applicable. If IHL qualifies as a self-contained legal system in the sense of a ‘special régime’, HRL standards are suppressed. In its weaker form, the principle of specialty means that both areas of law remain applicable. Additionally, whether the principle becomes relevant as a rule of interpretation or conflict resolution

⁸⁴ N Prud’homme ‘Lex Specialis: Oversimplifying a more complex and multifaceted Relationship?’ (2007) 40 *Israel Law Review* 369, 370.

⁸⁵ *Fragmentation Report* op cit (n37) 49.

⁸⁶ This term is used within the *Fragmentation Report* op cit (n37) 49, while describing the different forms of the *lex specialis* maxim.

⁸⁷ J Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 240, 214; *ILC Commentaries* op cit (n71) article 55(5) para 358: an ‘actual inconsistency’ between the norms is required.

⁸⁸ Pauwelyn op cit (n87) 165-167.

⁸⁹ *Ibid.*, 410; Lindroos op cit (n 64) 47.

⁹⁰ *Fragmentation Report* op cit (n37) 51.

⁹¹ *Ibid.*

⁹² *Fragmentation Report* op cit (n37) 53.

determines in turn if a human rights treaty body is competent to decide upon the legality of the acts of war by its member states.⁹³ If there is a conflict of norms and the IHL standard displaces human rights, this human rights guarantee is suspended and no individual complaint could be based on its violation.⁹⁴ If the *lex specialis* maxim is only applied in the weaker form of a rule of interpretation, the relevant human right is not suppressed, but at best interpreted in the light of IHL and the act of war can be reviewed by a human rights treaty body.⁹⁵

3. Application of the *lex specialis* principle to the relationship between IHL and HRL

a. Specialty of IHL

In order to be able to apply the *lex specialis* principle to the relationship between IHL and HRL either as a whole or to a conflict between individual norms, it is necessary to determine which of those regulatory systems is more specific. That of two rules, which both dealing with the same object, must take precedence over the other that contains all the features of the other rule and at least one additional criterion.⁹⁶ IHL standards require for their applicability the existence of an armed conflict as an additional feature compared to HRL standards.⁹⁷ Consequently, IHL is *lex specialis* in relation to HRL.⁹⁸

b. IHL as a Displacing ‘Special Régime’

An understanding of IHL as a special régime could, on the one hand, lead to the complete suppression of human rights conventions in the event of an armed conflict.⁹⁹ The two areas of law would be mutually exclusive and an application of human rights would not be possible during an armed conflict.¹⁰⁰ On the other hand, it could also be

⁹³ Johann op cit (n75) 137.

⁹⁴ G Thallinger *Grundrechte und extraterritoriale Hoheitsakte: Auslandseinsätze des Bundesheeres und Europäische Menschenrechtskonvention* (2008) 106.

⁹⁵ Johann op cit (n75) 137, 138.

⁹⁶ M Sassòli op cit (42) 71.

⁹⁷ *Fragmentation Report* op cit (n37) 57.

⁹⁸ Ibid.

⁹⁹ W Heintschel von Heinegg ‘Factors in War to Peace Transitions’ (2004) 27 *Harvard Journal of Law and Public Policy* 871.

¹⁰⁰ Ibid.

assumed that, although there is a closed regulatory system, HRL provisions apply to those aspects which are not regulated in IHL.¹⁰¹

(1) Does IHL Constitute a Self-contained Regulatory System?

i. The Concept of IHL

Although there is no legal definition of this area of law, it is possible to distinguish the standards of IHL from the norms of other international law, because they apply exclusively during an armed conflict, while norms of other international law are also applicable in times of peace.¹⁰² A distinction should not be made on the basis of individual international law treaties, since both IHL treaties contain regulations for peacetime and HRL treaties provide for regulations for situations of armed conflict.¹⁰³ Hence, the differentiation is to be made on the basis of individual regulations.

ii. IHL Standards as *numerus clausus*

In order to consider the rules of IHL self-contained, IHL would need to exclude all other rules in the case of an armed conflict. Instead, provisions such as articles 72 and 75(8) AP I indicate a fundamental openness of IHL.¹⁰⁴

Article 72 purports: ‘The provisions of this Section are *additional* ... to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’ (emphasis added).

Article 75(8) reads as follows: ‘No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.’

¹⁰¹ O Ben-Naftali ‘The Extraterritorial Application of Human Rights to Occupied Territories’ (2006) 100 *Proceedings of the American Society of International Law Annual Meeting* 91; European Commission for Democracy through Law ‘Possible Need for further Development of the Geneva Conventions’ Opinion no. 245/2003, 17 December 2003, Council of Europe, Doc. (CDL-AD(2003)18) 17-18, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2003\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)018-e), accessed on 6 July 2018.

¹⁰² N Balendra ‘Defining Armed Conflict’ (2008) 29 *Cardozo Law Review* 2464.

¹⁰³ See eg article 2(1) GCs I-IV, ICRC, entry into force 21 October 1950, 75 UNTS 31, 85, 135, 287, available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>, accessed on 6 July 2018; article 2 Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, UNGA Res. A/RES/44/128, entry into force 11 July 1991, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>, accessed on 6 July 2018.

¹⁰⁴ Sandoz, Swinarski, Zimmermann op cit (n22) paras 2927, 2928; J Pejic ‘Procedural Principles and safeguards for internment/administrative detention in armed conflict or other situations of violence’ (2005) 87 *IRRC* 378.

These norms belong to the third part of the additional protocol dedicated to the ‘Treatment of persons under the control of a party to a conflict’. This part grants individual rights and the articles 72, 75(8) AP I regulate the relationship to other standards to protect human rights. The wording ‘additional’ in article 72 AP I suggest a complementary application together with further standards on human rights protection. The fact that these further standards also include those outside of IHL, and in particular the international human rights conventions, results from the ratio of the norm. The ICCPR as well as several regional human rights treaties, contain a derogation clause. This clause suspends the validity of the treaties in different cases of national emergency, which comprises the event of an armed conflict. Nevertheless, each treaty contains a list of rights that remain in full force and effect. As a rule, an armed conflict fulfils the condition of the derogation clauses and thus justifies a derogation of the treaties by the member states concerned.¹⁰⁵ The provisions following article 72 AP I are intended to ensure a uniform human rights standard in the case of an armed conflict in addition to the respective derogations of the different treaties, from which, in turn, no derogation may be made under any circumstances.¹⁰⁶ In article 75(8) AP I, there is also a reference to a joint application of IHL and HRL standards. Article 75 paragraphs 1 to 7 AP I summarise the most important human rights standards that are to apply in the case of an armed conflict. Paragraph 8 clarifies the relationship with other provisions of ‘applicable rules of international law’. Again, it is possible to classify human rights treaties as inapplicable and to interpret the article 75(8) AP I in such a way that it is limited only to the relationship to other norms of IHL.¹⁰⁷ In comparison with article 75(1) AP I, which explicitly refers only to the relationship between the provisions of the article and other norms of IHL, article 75(8) AP I is broader by referring to all applicable and more favourable provisions.¹⁰⁸ If the subject-matter of article 75(8) AP I were also only IHL standards, article 75(1) AP I would be redundant.¹⁰⁹ Thus, there are no indications that IHL can be understood as a *numerus clausus* of all provisions applicable during an armed conflict.

¹⁰⁵ Sandoz, Swinarski, Zimmermann op cit (n22) para 2929.

¹⁰⁶ Ibid., para 2933.

¹⁰⁷ Ibid., paras 3144-3146.

¹⁰⁸ Sandoz, Swinarski, Zimmermann op cit (n22) para 3144.

¹⁰⁹ Johann op cit (n75) 146.

iii. International Case Law: IHL as an Open Regulatory Complex

The International Court of Justice first dealt with the question of IHL as a self-contained special regime in its *Nuclear Weapons Opinion*. In doing so, the Court examined the continued validity of article 6(1) ICCPR (right to life) in the case of an armed conflict.¹¹⁰ In the aforementioned opinion, the Court stressed that in principle, the validity of the ICCPR continues even during the period of hostilities. If the International Court of Justice considered IHL as a special régime, article 6(1) ICCPR would not be applicable. Furthermore, IHL is used as *lex specialis* in the *Nuclear Weapons Opinion* for interpretation as to whether a killing is ‘arbitrarily’ within the meaning of article 6(1) ICCPR. In 2004, the International Court of Justice delivered an opinion assessing the legality of the construction of a wall in the Israeli-occupied territories of Palestine (*Wall Opinion*), which maintained the opinion of 1996.¹¹¹

In the Court’s 2005 judgment concerning armed operations in a Congolese province occupied by Uganda (henceforth *Armed Activities Case*), the Court did not explicitly refer to the *lex specialis* principle mentioned in the two previous Opinions.¹¹² At least the International Court of Justice also analysed violations of rights guaranteed in the ICCPR in addition to violations of IHL standards, so that a continued validity of HRL in the event of an armed conflict is confirmed in this judgement, too.¹¹³

In October 2008, the International Court of Justice issued an order for preliminary measures relating to the conflict between Russia and Georgia.¹¹⁴ Despite the applicability of IHL, the Court noted violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹¹⁵ This is to be seen as a renewed confirmation of the continued validity of HRL during an armed conflict.¹¹⁶ This position was most recently reaffirmed in the Court’s judgment

¹¹⁰ ICJ *Nuclear Weapons Opinion* op cit (n20) para 25.

¹¹¹ ICJ *Wall Opinion* op cit (n21) para 106.

¹¹² ICJ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/.Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168 para 216.

¹¹³ ICJ *Armed Activities Case* op cit (n112) para 215-217.

¹¹⁴ ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, 353.

¹¹⁵ UNGA, International Convention on the Elimination of all Forms of Racial Discrimination (henceforth CERD), entry into force 4 January 1969, 660 UNTS 195, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, accessed on 7 July 2018; ICJ, *Application of the CERD* op cit (n114) para 112.

¹¹⁶ C Tomuschat ‘Human Rights and International Humanitarian Law’ (2010) 21 *EJIL* 18.

concerning this case in 2011, where the International Court of Justice analysed breaches of both IHL and HRL during the outbreak of the armed conflict in question.¹¹⁷

Therefore, international jurisprudence largely shares the aforementioned notion that IHL is not a self-contained special régime.

iv. Conclusion: IHL is not a Special Régime

Both IHL norms as well as international case law speak for the general openness of IHL. Taking the above mentioned into account, it can be noted that an exclusivity of HRL and IHL and a displacement of HRL by IHL as a special regime in the sense of a strong variant of the *lex specialis* maxim is neither confirmed in theory nor in international jurisprudence.

c. Application of the *lex specialis* Maxim as a Conflict Resolution or Interpretation Rule

In its weaker form, the *lex specialis* principle can be used to either resolve a conflict between two norms or, in the absence of a norm conflict, to interpret standards. Therefore, it is necessary to determine whether there is a conflict between individual HRL and IHL norms.

(1) Existence of a Conflict between IHL and HRL Norms

i. Norm Conflict in International Law

The conditions under which a norm conflict is to be accepted are not defined uniformly in international law. Notwithstanding the lack of a definition, it is a precondition for the acceptance of a norm conflict that the relevant norms apply and overlap in their application.¹¹⁸

(a) Functions of Norms in International Law

The function of a norm can be, on the one hand, to prescribe or prohibit a particular behaviour.¹¹⁹ Such orders and prohibitions have the normative function of a positive

¹¹⁷ ICJ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ICJ Reports 2011, 70 para 32.

¹¹⁸ *Fragmentation Report* op cit (n37) para 24.

¹¹⁹ Pauwelyn op cit (n87) 158, 159.

or negative obligation.¹²⁰ On the other hand, a norm can also have the function of a permission.¹²¹ The provision either allows to do something prohibited by another norm or it allows not to do something required by another norm.¹²² Both permission provisions constitute a positive permission.¹²³

(b) Narrow and Broad Definition of the Term 'Norm Conflict'

There are several approaches to the concept of norm conflicts, among which in particular narrow and broader definitions are to be distinguished.

The narrowest approach is to accept a norm conflict only if one party to two treaties cannot simultaneously meet its (positive or negative) obligations under both treaties.¹²⁴ This narrow understanding of a norm conflict is criticised for being limited to mutually exclusive obligations.¹²⁵ Possible constellations between other types of regulations, such as permissions, are disregarded.¹²⁶ In addition, many other definitions, which are based on a broader understanding of the term, are proposed by scholars.¹²⁷ Similarly, it is possible to equate the term 'conflict' very broadly with 'incompatibility' or 'contradiction' and to dispense with a dogmatic definition.¹²⁸

There are different constellations in which a conflict between two norms can exist. According to the narrow definitions, a norm conflict only exists when two obligations are mutually exclusive, i.e. cannot be complied with at the same time.¹²⁹ Such a situation exists when one norm prohibits what is required by another. Moreover, two prohibitions or two obligations may be mutually exclusive.¹³⁰

If, however, a positive permission contradicts an obligation, it is not clear, whether or not this situation constitutes a norm conflict.¹³¹ In any case, this is not

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ H Kelsen *Allgemeine Theorie der Normen* (1979) 78: in the authors opinion a negative permission is a permission allowing to do something that is neither prohibited nor required by any other norm.

¹²⁴ CW Jenks 'The Conflict of Law-Making Treaties' (1953) 30 *BYIL* 426.

¹²⁵ E Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *EJIL* 395, 396.

¹²⁶ Ibid., 396.

¹²⁷ See eg H Aufricht 'Supersession of Treaties in International Law' (1952) 37 *Cornell Law Quarterly* 655, 656; H Lauterpracht 'The Covenant as the "Higher Law"' (1936) 17 *BYIL* 58.

¹²⁸ Pauwelyn op cit (n87) 169.

¹²⁹ *Fragmentation Report* op cit (n37) para 24; CJ Borgen 'Resolving Treaty Conflicts' (2005) 37 *George Washington Int. Law Review* 575.

¹³⁰ Kelsen op cit (n123) 99.

¹³¹ J Finke *Die Parallelität internationaler Streitbeilegungsmechanismen - Untersuchung der aus der Stärkung der internationalen Gerichtsbarkeit resultierenden Konflikte* (Berlin) (2004) 158.

possible if the permission norm is only an exception to the obligation.¹³² It could be assumed that the permission is always displaced by the obligation, since it only allows optional behaviour, whereas the obligations prescribes mandatory behaviour.¹³³ If that were the case, a norm conflict would not be possible in such a situation. Due to the absence of a norm conflict, the *lex specialis* principle would not be applicable and the permission would be displaced even if it were more specific.¹³⁴ For this reason, the concept of a 'norm conflict' must be broadly defined and also comprise a situation in which a permission contradicts a prohibition or obligation.¹³⁵

ii. Conflict between Norms of IHL and HRL

As already stated, HRL continues to apply as a regulatory regime in the case of an armed conflict. However, it is possible that individual IHL norms could displace individual human rights by the means of the *lex specialis* principle as a conflict resolution rule. This requires a conflict between individual provisions of IHL and HRL.

(a) Norm Conflict according to the Narrow Approach

In accordance with the narrow approach, a norm conflict would exist if an obligation under a human rights convention would make it impossible to fulfil an IHL obligation, or vice versa. This would be the case, on the one hand, if IHL provisions were to dictate something that is prohibited by HRL. However, like HRL, IHL aims to protect individuals. In particular regarding the protection of the right to life, physical integrity and freedom of the person, IHL provides many relevant regulations.¹³⁶ An IHL norm with the explicit requirement of a human rights violation does not exist.¹³⁷

Theoretically, it is possible that a HRL norm contains a positive obligation to a behaviour that is prohibited under IHL.¹³⁸ Such a constellation can occur in occupied

¹³² Pauwelyn op cit (n87) 162.

¹³³ Jenks op cit (n124) 451.

¹³⁴ Pauwelyn op cit (n87) 171; Vranes op cit (n125) 396.

¹³⁵ Finke op cit (n131) 165; Pauwelyn op cit (n87) 175; Vranes op cit (n125) 403-405.

¹³⁶ See eg article 3(1) GCs I-IV.

¹³⁷ Johann op cit (n75) 180-182.

¹³⁸ H Krieger 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 282-284.

territories. According to article 43 Hague Convention IV¹³⁹, the occupying power is obliged to respect the laws in force in the occupied area.¹⁴⁰ According to article 64 GC IV, especially local criminal law continues to apply.¹⁴¹ At the same time, some HRL provisions include positive obligations for member states. The member states' failure to comply with these obligations can lead to a violation of human rights.¹⁴² A pertinent example is the obligation under article 8 ECHR (right to respect for private and family life) to avoid discrimination against children born to an unmarried mother, if necessary through the adoption of appropriate national laws.¹⁴³ Another example is the occupation of an area in which Sharia law is considered criminal law and, for instance, adultery is punished with stoning.¹⁴⁴ According HRL, the occupying state has a positive obligation to protect the right to life.¹⁴⁵ Due to this fact, the question arises as to whether the occupying power may be obliged to disregard or even amend certain local laws, which in turn would be incompatible with IHL.¹⁴⁶ However, such a norm conflict only arises if human rights conventions apply in occupied territories at all. Extra-territorial application of human rights treaties is assumed, at least with regard to negative obligations; i.e. the obligation not to violate the rights and freedoms of HRL.¹⁴⁷ Positive obligations resulting from HRL mainly include the establishment of legal mechanisms to ensure an effective protection of human rights.¹⁴⁸ In an occupied territory, however, local laws should continue to apply in order to preserve state sovereignty. For this reason, an extra-territorial application of positive obligations under HRL is rejected by scholars.¹⁴⁹

¹³⁹ International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, entry into force 26 January 1910, available at <http://www.refworld.org/docid/4374cae64.html>, accessed on 7 July 2018.

¹⁴⁰ Krieger op cit (n138) 282-284.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ ECtHR, *Case of W. v. the United Kingdom* (Application no. 9749/82), Judgment, 8 July 1987 available at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57600"\]}](https://hudoc.echr.coe.int/eng#{), accessed on 7 July 2018; ECtHR *Case of Vermeire v. Belgium* (Application no. 12849/87), Judgment 29 November 1991 available at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57712"\]}](https://hudoc.echr.coe.int/eng#{), accessed on 7 July 2018.

¹⁴⁴ M Milanović 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 *Journal of Conflict and Security Law* 480.

¹⁴⁵ See eg article 6 ICCPR.

¹⁴⁶ Krieger op cit (n138) 283.

¹⁴⁷ ICJ *Wall Opinion* op cit (n21) para 25; O Ben-Naftali, Y Shany 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-2004) 37 *Israel Law Review* 18.

¹⁴⁸ E Roxstrom, M Gibney, T Einarsen 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection' (2005) 23 *Boston University International Law Journal* 72.

¹⁴⁹ Roxstrom, Gibney, Einarsen op cit (n148) 75.

On the whole, a norm conflict between positive HRL obligations and negative IHL obligations seems possible in the case of occupied territories, but will usually not occur to this extent due to a lack of validity of HRL.

(b) Norm Conflict according to the Broad Approach

A norm conflict between a permission and an obligation is only plausible to the extent that an IHL provision permits something positive that is prohibited under HRL. It is argued that IHL permits a violation of, for example, the right to life of combatants during fighting or the freedom of the person if prisoners of war may be detained.¹⁵⁰ In some cases it is even assumed that the entire IHL is based on a 'right to kill'.¹⁵¹

Nevertheless, a norm conflict is impossible if the permission is merely an exception to a prohibition.¹⁵² Article 53 GC IV, which permits the destruction of property by the occupying power in cases of absolute military necessity, is drafted as a prohibition and the permissive content is designed as a strict exception. Thus, the permission has no separate regulatory content and does not qualify as an individual permission norm.

However, article 21(1) GC III, which stipulates that prisoners of war can be interned, could be understood as an autonomous permission. The standard stipulates that prisoners of war must be detained after they have been captured in order to prevent escape.¹⁵³ The provision would lack an independent meaning, if a categorically prohibitive character of IHL were to be assumed.¹⁵⁴ In fact, most IHL norms are drafted as prohibitions. It can therefore be assumed that everything that is not prohibited is permitted during an armed conflict.¹⁵⁵ This is based on the idea that IHL

¹⁵⁰ AM Gross 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *EJIL* 32; RK Goldman, BD Tittmore 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law' (2002) *The American Society of International Law Task Force on Terrorism* 46, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2762865, accessed on 7 July 2018.

¹⁵¹ UN Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights *Working paper on the relationship between human rights law and international humanitarian law* by F Hampson and I Salama (2005) UN Doc. E/CN.4/Sub.2/2005/14 para 45, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/145/68/PDF/G0514568.pdf?OpenElement>, accessed on 7 July 2018.

¹⁵² See above (n132).

¹⁵³ JS Pictet *Commentary III Geneva Conventions – Relative to the Treatment of Prisoners of War* (1960) article 21, 178.

¹⁵⁴ J Westlake *International Law Part II – War* 2ed (1913) 3.

¹⁵⁵ A Bleckmann 'Die Handlungsfreiheit der Staaten – System und Struktur der Völkerrechtsordnung' 29 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 191.

subsequently tried to make an already existing state without rules, namely an armed conflict, more humane through prohibitions. Westlake writes in this context:

‘International Law did not institute war, which it found already existing, but regulates it with a view to its greater humanity’.¹⁵⁶

In accordance with that view, the Permanent Court of International Justice ruled in 1927 that because of state sovereignty in international law, a fundamental freedom of action of states is to be assumed, which can only be restricted by positive prohibitions.¹⁵⁷

If, therefore, everything that is not prohibited is consequently regarded as permitted in IHL, norms such as article 21(1) GC III, do not have the meaning of a positive permission norm. As a second consequence, the consideration of IHL as a prohibitive regulatory complex raises the question of whether anything that is not prohibited can be regarded as positively permissive.¹⁵⁸ Kelsen, however, understands this as a merely negative permission without its own regulatory content.¹⁵⁹ Rather, there is the idea that everything that is not prohibited is to be regarded as permitted, with the negative permission, that everything that is not prohibited is not permitted positively, but is merely accepted.¹⁶⁰

A norm conflict between a prohibition of HRL and a permission of IHL is not apparent in the absence of a positive permissive norm in IHL.

(2) The *lex specialis* Maxim as a Rule of Interpretation: HRL Norms in the Light of IHL

Since there is no norm conflict between provisions of HRL and IHL, the *lex specialis* principle cannot be applied as a conflict resolution rule to replace individual norms of

¹⁵⁶ Westlake op cit (n154) 3.

¹⁵⁷ Permanent Court of International Justice *The Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, 7 September 1927, Publication Series A.-No.10, 19.

¹⁵⁸ D Kretzmer, R Giladi, Y Shany ‘International Humanitarian Law and International Human Rights Law: Exploring parallel Application’ (2007) 40 *Israel Law Review* 307.

¹⁵⁹ Kelsen op cit (n123) 81: ‘With regard to the validity of a positive legal system one usually says: “what is not prohibited is permitted.” If permissiveness has the negative meaning of something being neither required nor forbidden, this rule does not apply, for it is a contradiction to say: “what is not prohibited is neither required nor prohibited.” A positive determination of a rule is ruled out.’ (Original in German: ‘In Bezug auf die Geltung einer positiven Rechtsordnung pflegt man zu sagen: “was nicht verboten ist, ist erlaubt.” Hat Erlaubt-Sein die negative Bedeutung des weder Geboten- noch Verboten-Seins, trifft die Regel nicht zu, denn es ist ein Widerspruch zu sagen: “Was nicht verboten ist, ist weder geboten noch verboten.” Eine positive Statuierung einer Regel kommt nicht in Betracht.’, translated by the author of this minor dissertation).

¹⁶⁰ T Meron ‘The Humanization of Humanitarian Law’ (2000) 97 *The American Journal of International Law* 240.

HRL in favour of IHL norms. The *lex specialis* maxim can therefore only be applied as a rule of interpretation to the relationship between the two regulatory regimes. In cases where HRL provisions differ from IHL provisions in terms of content or to the extent of the rights they guarantee, they may be interpreted in the light of the more specific IHL standards by means of the *lex specialis* maxim. This section discusses the characteristics of such an interpretation.

Many individual rights enjoy equivalent protection in both areas of law. For instance, the prohibition of torture and inhuman treatment is codified in both in IHL and HRL.¹⁶¹ In such a case, an interpretation will lead to no particular result.¹⁶² If, on the other hand, a HRL rule contains an indefinite legal concept, the special features of IHL can be taken into account in the evaluation of the standard.¹⁶³ However, some rights are not dealt with in IHL, for instance the right to marry.¹⁶⁴ In the context of an interpretation of HRL in the light of IHL, the silence of IHL about, for example, the right to marry could be given the meaning that this right should not apply during an armed conflict.¹⁶⁵ This would lead to an inappropriate suspension of human rights, which would clearly go beyond the limits of interpretation.¹⁶⁶

A good example of a possible application of the *lex specialis* maxim as a rule of interpretation is an interpretation of article 6(1) ICCPR (Right to Life) in the light of IHL. For article 6(1) ICCPR contains the indefinite legal term ‘arbitrarily’ through which the values of IHL can be implemented.

A deprivation of life during an armed conflict is therefore only arbitrarily and thus not in accordance with HRL, if it is to be qualified as arbitrarily in the sense of the more specific IHL.¹⁶⁷ In order to determine when such an arbitrary killing occurs,

¹⁶¹ M Bothe ‘Humanitäres Völkerrecht und Schutz der Menschenrechte: Auf der Suche nach Synergien und Schutzlücken’ in PM Dupuy, B Fassbender, MN Shaw, KP Sommermann (eds) *Festschrift Tomuschat - Völkerrecht als Weltordnung Common Values in International Law* (2006) 86.

¹⁶² Differing opinion: W Kälin (ed) *Human Rights in Times of Occupation: The Case of Kuwait* (1994) 27; IHL can be used to clarify the concept of inhumane treatment.

¹⁶³ P Hector ‘Das Humanitäre Völkerrecht als *lex specialis* - Zum Verhältnis des Humanitären Völkerrechts und internationalen Menschenrechtsschutz angesichts der besonderen tatsächlichen Umstände eines bewaffneten Konflikts’ in C Calliess (ed) *Herausforderung an Staat und Verfassung – Völkerrecht - Europarecht – Menschenrechte – Liber Amoricum für Torsten Stein zum 70. Geburtstag* (2015) 969.

¹⁶⁴ F Hampson ‘Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?’ in MN Schmitt (ed) *The War in Afghanistan: a Legal Analysis* (2009) 498; see for a human right to marry: article 23(2) ICCPR.

¹⁶⁵ F Hampson op cit (n164) 498.

¹⁶⁶ Ibid.

¹⁶⁷ also ICJ *Nuclear Weapons Opinion* op cit (n20) para 25; UN Commission on Human Rights ‘Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of

a distinction must be made between combatants and the civilian population.¹⁶⁸ Combatants constitute a legitimate target for fatal attacks during an armed conflict and the question whether they can be deprived of their lives or not is not subject to any special restrictions by IHL.¹⁶⁹ Only the question of ‘how’ such a deprivation of life is to be carried out is limited by the prohibition of superfluous injuries and unnecessary suffering in article 35(2) AP I. According to article 51(5)(b) AP I, incidental loss of civilian life is tolerated as collateral damage of an attack only if it is not excessive in relation to the expected and concrete military advantage.

In the following, this section discusses under what preconditions the proportionality of losses of the civilian population can be assumed, comparing the understanding of proportionality in IHL on the one hand and in HRL on the other hand. Moreover, it constitutes a limit of interpretation if the IHL itself has indefinite legal concepts in order to concretise the protection of the right to life.

i. Proportionality in IHL and HRL

For the assessment of the proportionality of a military attack, IHL uses a different standard than HRL.¹⁷⁰ The proportionality of civilian casualties in IHL depends only on the relation between the number of victims and the military advantage, whereas according to HRL killing is only proportionate if it is necessary, i.e. there are no milder means available, and if it is appropriate when weighing the right of the individual against the risk to other people caused by this individual.¹⁷¹ If the term ‘arbitrarily’ were determined on the basis of the HRL principle of proportionality, any killing, even that of a combatant, would have to be necessary and appropriate. This would already not be the case even if milder means were available.¹⁷² The main objective of a state in an armed conflict is to weaken the opposing forces.¹⁷³ This can be achieved by

19 October 2000’, 16 March 2001, UN Doc. E/CN.4/2001/121, para 62, available at <http://www.refworld.org/docid/3ae6b139c.html>, accessed on 11 July 2018.

¹⁶⁸ Article 48 AP I; Y Dinstein *Conduct of Hostilities under the Law of International Armed Conflict* 3ed (2016) 102.

¹⁶⁹ K Watkin ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *The American Journal of International Law* 33.

¹⁷⁰ I Scobbie ‘Human rights protection during armed conflict: what, when and for whom?’ in E de Wet, J Kleffner (eds) op cit (n39) 12-13.

¹⁷¹ N Lubell ‘Challenges in applying human rights law to armed conflict’ (2005) *IRRC* 745-746.

¹⁷² G Gaggioli ‘The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms’ (2013) *Report of ICRC Expert Meeting* 8-9, available at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>, accessed 7 November 2018.

¹⁷³ JS Pictet *Development and principles of international humanitarian law* (1985) 62.

death, wounding or capture.¹⁷⁴ A killing would only be regarded as not ‘arbitrarily’ if it is the last resort (*ultima ratio*) and all other non-lethal measures have been exhausted.¹⁷⁵ In this context, it may be considered whether there is a duty to capture instead of killing, as long as it does not involve an increased risk for the own armed forces.¹⁷⁶ However, an unrestricted implementation of this standard seems hard to imagine during combat operations.

The primary aim of the principle of proportionality in IHL, contrary to HRL, is the protection of the own armed forces.¹⁷⁷ But if the proportionality of civilian casualties were always determined by these low standards, the protection of the right to life as granted in HRL would be very limited. At least the question of whether there exist milder means available should be assessed before a military attack involving civilian casualties.

Instead of applying solely the proportionality standard of IHL, it makes more sense to apply both proportionality standards, limiting the standard of HRL by the standard of the IHL as *lex specialis*.¹⁷⁸ As a result, this joint application of both proportionality standards means that a milder means cannot be demanded if it would endanger the force.¹⁷⁹

ii. The Principles of Humanity and Military Necessity

Further problems in the interpretation of the term ‘arbitrarily’ arise when IHL itself does not specifically predefine the conditions for a legal killing. This is the case, for example, in article 57(2) AP I, which states that when planning an attack, ‘everything feasible’ should be done to avoid losses in the civilian population. What exactly falls under the concept of the ‘everything feasible’ is not specified in more detail.

Another example is civilians who participate directly in hostilities. According to article 51(3) AP I, they no longer enjoy separate protection as civilians, nor do they receive the rights of a combatant.¹⁸⁰

¹⁷⁴ Ibid.

¹⁷⁵ M Lesh ‘Interplay as regards conduct of hostilities’ in E de Wet, J Kleffner (eds) op cit (n39) 106.

¹⁷⁶ Ibid., 103.

¹⁷⁷ Ibid., 111.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Sandoz, Swinarski, Zimmermann op cit (n22) para 1942.

In order to interpret arbitrariness in such cases in the light of IHL, the principles of humanity and military necessity of IHL could be used.¹⁸¹ These two principles underlie IHL.¹⁸² Moreover, notions of HRL are included in the principle of humanity.¹⁸³ In such cases, where IHL includes indefinite legal concepts, an interpretation exclusively on the basis of IHL as *lex specialis* of the term ‘arbitrarily’ reaches its limits. The vague legal concept of IHL should be interpreted in the light of the principles of humanity and military necessity. Values of HRL apply to the principle of humanity, which in turn is limited by the principle of military necessity.¹⁸⁴

4. Criticism Concerning the Application of the *lex specialis* Maxim to Solve the Systemic Relationship between IHL and HRL

There is no doubt about the suitability of the *lex specialis* maxim for clarifying the relationship between norms of the same regulatory complex or even related regulatory systems.¹⁸⁵ However, some scholars consider the maxim unqualified to apply to provisions of two independent regulatory regimes, such as IHL and HRL.¹⁸⁶ It is also stated that it cannot be established with certainty which law is more specific. In this context, the rules on health protection during a military occupation are mentioned as an example, because in this area the human rights provisions are much more detailed than those of IHL.¹⁸⁷ Alternatively, a parallel application of the legal complexes in the sense of harmonisation is advocated.¹⁸⁸ The overlapping norms of the two regulatory complexes should be applied together.¹⁸⁹

¹⁸¹ The ICJ used the principle of humanity to interpret IHL: *Nuclear Weapons Opinion* op cit (n20) para 95; The ICRC’s ‘Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law’ (2009) 82 explicitly bases its view concerning the restrictive use of force against civilian participants in hostilities on both principles, available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, accessed on 12 July 2018; M Lesh op cit (n175) 114; critically: MN Schmitt ‘Wound, Capture, or Kill: A Replay to Ryan Goodman’s “The Power to Kill or Capture Enemy Combatants”’ (2013) 24 *EJIL* 861.

¹⁸² MN Schmitt ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 *Virginia Journal of International Law* 796-798.

¹⁸³ Meron op cit (160) 239.

¹⁸⁴ M Lesh op cit (n175) 112-113.

¹⁸⁵ Lindroos op cit (n 64) 41.

¹⁸⁶ Prud’homme op cit (n84) 379-380.

¹⁸⁷ Lubell op cit (n171) 737.

¹⁸⁸ Prud’homme op cit (n84) 386-388.

¹⁸⁹ Ben-Naftali, Shany op cit (n147) 51.

The fact that the ICJ did not quote its earlier decisions in its judgment in the *Armed Activities Case*¹⁹⁰ and no longer explicitly named the *lex specialis* rule is partly seen as an indication that it rejected this approach.¹⁹¹

Although the application of the *lex specialis* principle partially reaches its limits and cannot bring about perfect harmony between standards of IHL and HRL, practical examples for a different, parallel application of overlapping norms are still lacking.¹⁹²

E. Conclusion

Taking all the above mentioned into account, the first research question can be answered with the statement that both provisions of IHL and HRL are applicable in situations of armed conflict. More precisely, IHL is *lex specialis* in the case of an armed conflict. However, HRL does not cease to be applicable. Should the protection standard of the two regulatory complexes differ, the IHL standards does not replace the HRL standard completely. The HRL provision is rather to be interpreted in the light of the more specific IHL provision if it allows for an interpretation of an indefinite legal concept. In the event that IHL itself is not conclusively clear in a regulation, HRL values are to be considered when it comes to proportionality and the principle of humanity. Nevertheless, all of these considerations are limited by the principle of military necessity.

¹⁹⁰ ICJ *Armed Activities Case* op cit (n112).

¹⁹¹ C Droège 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 338.

¹⁹² M Lesh op cit (n175) 120.

III. LEGAL PROTECTION OF JOURNALISTS AND MEDIA FACILITIES DURING ARMED CONFLICT

This chapter focusses on the second research question, namely which laws under IHL or HRL protect journalists and media facilities during an armed conflict. The safety of journalists and media facilities is endangered due to multiple factors during situations of violent conflicts. Not only are they at risk of getting injured in the course of the general violence taking place in the conflict zones but journalists and media facilities are also deliberately targeted. Moreover, non-profit organisations claim that most of the journalists' rights violations remain unpunished.¹⁹³ In light of this high level of impunity, this chapter examines the legal framework for the protection of journalists and media facilities for possible gaps. The relevant HRL and IHL regulations are presented and examined. Furthermore, relevant soft law is analysed. In the event that different standards of protection should arise from the different regulatory complexes, the relationship between these provisions is explained.

A. International and Regional Human Rights Law

In order to carry out their work unhindered, the protection of some human rights is of particular importance to journalists. At the heart of journalists' profession is the protection of the right to freedom of expression. In addition, journalists are often exposed to threats to their lives, bodies and personal freedom because of their work. For this reason, this section also examines the protection of the right to life, the prohibition of torture and the right to personal freedom and security in HRL with regard to the risks that journalists in times of an armed conflict face.

1. The Right to Freedom of Expression

The right to freedom of expression is essential for journalists to carry out their work. The global importance of the right is highlighted in the preamble of the Universal Declaration of Human Rights (UDHR) where it says '...the advent of a world in which

¹⁹³ A W Khan 'Pervasive Climate of Impunity Makes Journalists Easy Targets' in UNESCO *Press freedom: safety of journalists and impunity* (2007) 5-6, available at <http://unesdoc.unesco.org/images/0015/001567/156773e.pdf>, accessed on 07.08.2018; for recent figures see: Committee to Protect Journalists *Getting Away With Murder: 2017 Global Impunity Index* (2017) available at https://cpj.org/reports/Impunity-2017_NEW.pdf, accessed on 07.08.2018.

human beings shall enjoy freedom of speech ... has been proclaimed as the highest aspiration of the common people'.¹⁹⁴

a. Codification in Human Rights Conventions

Internationally, the right to freedom of expression is granted in the UDHR and the ICCPR. The right to freely '... seek, receive and impart information and ideas through any media' is enshrined in article 19 UDHR, which is a non-binding legal document although its guarantees are broadly recognised. Article 19 ICCPR is more elaborate in its wording and obliges its member states to protect the individuals' right to freely to '... seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

On a regional level, article 10 ECHR, article 13 ACHR and article 9 African Charter on Human and Peoples' Rights¹⁹⁵ (ACHPR) protect the right to freely receive and disseminate information.

However, in none of these conventions is there an explicit reference to journalists or media facilities when it comes to the right to freedom of expression.

b. Possibility of Derogation

The ICCPR as well as the ECHR and ACHR contain a derogation clause.¹⁹⁶ An armed conflict will in most cases fulfil the conditions of the clauses. In this case, the state is allowed to temporarily derogate from its obligation to protect and guarantee freedom of expression and if this derogation is necessary.¹⁹⁷ Thus, the protection of the right to freedom of expression and therefore the work of journalists can be significantly restricted during an armed conflict.

¹⁹⁴ Preamble UDHR op cit (n41).

¹⁹⁵ Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights*, entry into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, accessed on 09 August 2018.

¹⁹⁶ Article 4 ICCPR; article 15 ECHR; article 27 ACHR.

¹⁹⁷ UN Human Rights Committee (HRC), *ICCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* paras 2 and 3, 31 August 2001, Doc. CCPR/C/21/Rev.1/Add.11, available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en, accessed on 09 August 2018.

c. International Customary Law

Although the right to freedom of expression is codified in article 19 UDHR, which some scholars argue to be CIL¹⁹⁸, it cannot be assumed that all rights of the UDHR have obtained customary status.¹⁹⁹ However, there are no indications for an *opinio iuris* and state practice that the right to freedom of expression forms part of CIL.

2. Other relevant Human Rights

Given the dangers that journalists often face especially in conflict situations²⁰⁰ several other human rights are directly relevant to the work of journalists. To prevent deliberate targeting of journalists, the right to life (article 3 UDHR, article 6 ICCPR, article 2 ECHR, article 4 ACHR, article 4 ACHPR), the prohibition of torture (article 5 UDHR, article 7 ICCPR, article 3 ECHR, article 5(2) ACHR, article 5 ACHPR) and the right to personal freedom and security (article 3 UDHR, article 9 ICCPR, article 5 ECHR, article 7 ACHR, article 6 ACHPR) are particularly important.

These rights are also protected if a journalist is abroad because every state is obliged to refrain from violating these individual rights and – for instance in the case of a NIAC on its territory – to prevent such violations by non-state actors to a certain extent.²⁰¹

B. International Humanitarian Law

Under IHL, the protection of journalists is mostly restricted to protecting their basic human rights. There are no provisions aimed at protecting a journalist's ability to work, especially the right to freedom of expression, but rather the journalist's right to life. In IHL, the term journalist is quite broad and designed to include a wide circle of people.²⁰² It comprises 'any correspondent, reporter, photographer, and their technical

¹⁹⁸ B Simma, P Alston 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989) 12 *Australian Yearbook of International Law* 90-100.

¹⁹⁹ H Charlesworth 'Universal Declaration of Human Rights (1948)' (2008) para 16 in: *Max Planck Encyclopedia of Public International Law*, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887#>, accessed 09 August 2018.

²⁰⁰ See Introduction of this thesis, 1.

²⁰¹ See the jurisprudence of the Inter-American Court of Human Rights, especially the case *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 para 172, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf, accessed 6 November 2018.

²⁰² S Sivakumaran op cit (n50) 311; Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 921.

film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation’.²⁰³

Historically, special protection of journalists was not mentioned in IHL documents until article 79 was included in AP I in 1977.²⁰⁴ Before that, only article 13 of The Hague Convention IV provided that ‘Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters’ are under certain conditions entitled to a treatment analogous to that of prisoners of war upon capture.²⁰⁵

1. Protection of Journalists

There are four categories of journalists in armed conflict, namely war correspondents, journalists engaged in dangerous professional missions and journalists working for information services of the armed forces, all of whom enjoy different protection.²⁰⁶

a. War Correspondents

The *Dictionnaire de droit international public* defines a war correspondent as a ‘specialised journalist who is present, with the authorisation and under the protection of the armed forces of a belligerent, on the theatre of operations and whose mission is to provide information on events relating to ongoing hostilities’.²⁰⁷ War correspondents are formally accredited to the armed forces and provided with an identity card indicating their status.²⁰⁸ The ICTY defined war correspondents as ‘individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict’.²⁰⁹ This definition lacks the requirement of the authorisation of a belligerent and is thus too broad.²¹⁰ For only authorised, namely accredited, correspondents permitted to accompany the armed

²⁰³ Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 921.

²⁰⁴ Ibid., 918.

²⁰⁵ International Conferences (The Hague) op cit (n139).

²⁰⁶ S Sivakumaran op cit (n50) 311.

²⁰⁷ J Salmon (ed) *Dictionnaire de droit international public* (2001) 275, French text ‘journaliste spécialisé qui est présent, avec l’autorisation et la protection des forces armées d’un belligérant, sur le théâtre des opérations et qui a pour mission d’informer sur les événements liés au cours des hostilités’, translated by A Balguy-Gallois op cit (n10) 2.

²⁰⁸ S Sivakumaran op cit (n50) 312.

²⁰⁹ ICTY, *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36), Decision on interlocutory appeal (hereinafter *Randall* case), 11 December 2002, para 29.

²¹⁰ A Balguy-Gallois op cit (n10) 2.

forces qualify as war correspondents.²¹¹ The military authorities are required to issue an identity card so that war correspondents can prove their status.²¹²

In 1949, article 4(A)(4) GC III was introduced to expand the protection granted in article 13 of The Hague Convention IV since 1907 from analogous to real prisoner-of-war-status for war correspondents upon capture.²¹³ However, according to article 4(A)(4) GC III, war correspondents ‘accompany the armed forces without actually being members thereof’. Hence, they are protected as civilians.²¹⁴

b. Journalists engaged in dangerous Professional Missions

As a result of the 1974-1977 Diplomatic Conference in Geneva, article 79 regarding measures of protection for journalists engaged in dangerous professional missions, was included in AP I as an addition to the standard of protection guaranteed in article 4(A)(4) GC III.²¹⁵ During the drafting process of this norm, it was discussed to either establish a special convention concerning the protection of journalists in times of armed conflicts or at least grant them exceptional protection under a special status.²¹⁶ However, the Diplomatic Conference decided against any kind of special protection because they feared this could lead to a weakening of the already existing protected statuses such as the protection of medical personnel.²¹⁷

As a result, article 79 AP I is to be regarded rather as a reaffirmation of the civilian status of journalists engaged in dangerous professional missions as per article 50(1) AP I, than a guarantee with autonomous legal content.²¹⁸

Journalists engaged in dangerous professional missions are those journalists not accredited as war correspondents and who conduct any professional activity, namely ‘being in the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them to ... (a) newspaper or agency’ in an area affected by hostilities.²¹⁹

²¹¹ Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 918.

²¹² *Ibid.*

²¹³ Great Britain, UK Ministry of Defence *The Manual of the Law of Armed Conflict* (2004) 149 para 8.18.

²¹⁴ HP Gasser ‘Protection of the Civilian Population’ in D Fleck, M Bothe (eds) *The Handbook of International Humanitarian law* (2008) 257.

²¹⁵ A Ballguy-Gallois op cit (n10) 3.

²¹⁶ Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 919-920.

²¹⁷ *Ibid.*, 922.

²¹⁸ *Ibid.*, 920.

²¹⁹ S Sivakumaran op cit (n50) 312; Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 921.

Since journalists engaged in dangerous professional missions are civilians, they are protected against the effects of hostilities and against arbitrary conduct if they are captured.²²⁰ Furthermore, in 2002 the ICTY decided with the *Randal* case that journalists engaged in dangerous professional missions have testimonial privilege with regards to events relating to their work.²²¹ As civilians, journalists engaged in dangerous professional missions lose their protection for the time they take a direct part in the hostilities, article 50(3) AP I. However, journalistic activities do not constitute taking a direct part in hostilities – even if they should benefit one belligerent party.²²² Likewise, following the armed forces or riding a military vehicle does not lead to the forfeiture of civilian status.²²³ Nevertheless, such behaviour might increase the risk for journalists to be killed during a lawful attack against the military objective.²²⁴

Thus, targeted attacks on journalists are a violation of IHL although unfortunately, this constitutes a frequent practice during armed conflicts.²²⁵

c. Embedded Journalists

In the Iraq War in 2003, journalists were incorporated in the troops and obliged to stay with the military unit.²²⁶ This category of journalists is fairly new and not yet uniformly regulated.²²⁷ Therefore some states even grant journalists embedded in their armed forces prisoner-of-war status upon capture, while other states grant civilian protection only.²²⁸ Moreover, the practice of embedding journalists is criticised for bearing the risk of conditioning information and restricting independent reporting.²²⁹

²²⁰ A Ballguy-Gallois op cit (n10) 4; HP Gasser 'The Protection of journalists engaged in dangerous professional missions' (1983) 23 *IRRC* 14-16; S Boiton-Malherbe *La protection des journalistes en mission périlleuse dans les zones de conflit armé* (1989) 155-158.

²²¹ ICTY op cit (n209) paras 36, 38, 50.

²²² S Sivakumaran op cit (n50) 312; HP Gasser op cit (n214) 257.

²²³ S Sivakumaran op cit (n50) 312.

²²⁴ *Ibid.*, 313.

²²⁵ UN Security Council, Resolution 1738 'Protection of Civilians in Armed Conflict', adopted 23 December 2006, available at <https://www.un.org/press/en/2006/sc8929.doc.htm>, accessed on 01 November 2018.

²²⁶ C Zanghì 'The Protection of Journalists in Armed Conflict' in PA Ferández-Sánchez (ed) *The New Challenges of Humanitarian Law in Armed Conflicts* (2005) 155.

²²⁷ A Ballguy-Gallois op cit (n10) 5.

²²⁸ *Ibid.*

²²⁹ C Zanghì op cit

d. Journalists working for Information Services of the Armed Forces

Journalists falling under this last category are members of the armed forces and therefore combatants.²³⁰

2. Protection of Media Facilities

In general, media facilities, which include equipment and buildings, are civilian objects and therefore do not constitute a legitimate target for a military attack.²³¹ The following articles prohibit an attack on civilian objects: articles 33(2),(3) and (5) and 147 GC IV, articles 48, 52, 53, 54, 56, 85(3c), (3d) and (4d) AP I, articles 11, 14, 15 and 16 AP II and article 8(2) of the Rome Statute. Especially article 48 AP I obliges armed forces to distinguish between civilian and military objects and to attack only the latter. It follows, that civilian objects enjoy general protection as per article 52 AP I.²³²

Article 52(1) AP I defines civilian objects as ‘all objects which are not military objectives’. This negative definition was upheld in the ICTY *Blaškić* case when a civilian object was defined as ‘any property that could not be legitimately considered a military objective’.²³³ Thus, media facilities that do not ‘by their nature, location, purpose or use make an effective contribution to military action’ are to be considered civilian objects.²³⁴ Additionally, civil objects have the privilege of a presumption of civil use in cases of doubt pursuant to Article 52(3) of AP I. Nevertheless, states disregard this rule. For instance, on 22 February 2012 the Syrian Army attacked the media centre Baba Amr News in Homs, killing two journalists.²³⁵

However, media facilities can serve dual purposes during armed conflicts, for instance not only broadcasting civilian programmes but being also used by armed forces to communicate.²³⁶ Moreover, media facilities could be used for propaganda

²³⁰ Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 921; LC Green *The Contemporary Law of Armed Conflict* (2008) 109.

²³¹ S Sivakumaran op cit (n50) 313.

²³² A Ballguy-Gallois op cit (n10) 7.

²³³ Ibid.; ICTY, *The Prosecutor v. Tihomir Blaškić* (IT-95-14), Judgment of 3 March 2000 (hereinafter *Blaškić* case), para 180, available at <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>, accessed 2 November 2018.

²³⁴ Article 52(2) AP I.

²³⁵ See inter alia ‘Foreign journalists killed amid Homs shelling’ 22 November *Al Jazeera*, available at <http://www.aljazeera.com/news/middleeast/2012/02/201222291445322238.html>, accessed 4 November 2018; P Beaumont ‘Marie Colvin experienced war alongside those who suffered in war’ 22 February 2012 *The Guardian*, available at <https://www.theguardian.com/world/2012/feb/22/marie-colvin-war-correspondent-tributes>, accessed 4 November 2018.

²³⁶ S Sivakumaran op cit (n50) 313.

purposes.²³⁷ It is not clear, if media facilities constitute military objectives in these two cases and thus, if they can be lawfully attacked. Generally, the immunity of civilian objects under IHL ceases if the objects are used for hostile purposes.²³⁸

a. Dual-Use Targets

IHL lacks a definition or concept of an object that is neither completely civilian nor military.²³⁹ Media facilities qualify as a dual-use target if they fulfil both civilian and military functions.²⁴⁰ In the case of a military attack of such a dual-use-target, it is almost impossible to do so without harming and, in times, seriously affecting the civilian population.²⁴¹ In such a case the criteria of proportionality and military necessity need to be assessed with the utmost thoroughness. Namely,

‘the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must be expected among the civilian population and the damage which would be caused to civilian objects’.²⁴²

With regard to the objective of AP I, which is to protect civilians, the anticipated military advantage needs to be definite in light of the available information and not only potential or indeterminate.²⁴³ Of crucial importance is the notion, that the IHL standard of proportionality is assessed *a posteriori*, based only at the information available at the time of the attack.²⁴⁴ This renders the military attack’s actual result in terms of civilian casualties irrelevant for the assessment of the proportionality.²⁴⁵ As mentioned above, the standard of proportionality differs in IHL and HRL.²⁴⁶ In particular, proportionality in HRL is measured on the basis of an *ex post facto* consideration of the actual damage caused to the civilian population.²⁴⁷ The implications of an assessment based solely on the information available in advance can

²³⁷ Ibid.

²³⁸ A Ballguy-Gallois op cit (n10) 8.

²³⁹ M Sassòli, L Cameron ‘The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*’ in: N Ronzitti, G Venturini (eds) *The Law of Air Warfare* (2006) 57.

²⁴⁰ GD Solis *The Law of Armed Conflict: International Humanitarian Law in War* (2010) 534.

²⁴¹ Ibid.

²⁴² Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 636.

²⁴³ Ibid.

²⁴⁴ B Sang ‘Clearing some of the fog of war over combating terrorists on the frontiers of international law: targeted killings and international humanitarian law’ (2011) *African Yearbook of International Law* 35.

²⁴⁵ D Kretzmer ‘Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of self-defence?’ (2005) 16 *European Journal of International Law* 201.

²⁴⁶ See above Chapter 2 IV 3. c. (2) i., 27-28 of this thesis.

²⁴⁷ B Sang op cit (n244) 42.

be devastating, as the example of the bombing of a bunker in Al-Amiriya, central Baghdad during the second Gulf War by the US Air Force shows.²⁴⁸ On 13 February 1991, two American missiles struck the bomb shelter and killed more than 400 civilians.²⁴⁹ According to the information available to the US military prior to the attack, the bunker was used as an important military command and control centre and thus, a military target.²⁵⁰ Intelligence information supported that assumption and the US military even suspected president Saddam Hussein to be present in the bunker.²⁵¹ However, the Al-Amiriya bunker was of dual use as it sheltered hundreds of civilians during the night.²⁵² This example illustrates the difficulty of targeting dual-use objects. There is no general rule in IHL on how to deal with these dual-use-targets, but the legality of an attack must rather be assessed on a case-by-case basis.²⁵³

During contemporary conflicts, media facilities are often of dual use.²⁵⁴ Consequently, there are several instances where dual-use media facilities were targeted in past conflicts. In 1999, during the Kosovo War, the NATO forces bombed the Radio Television of Serbia headquarters (hereinafter RTS) in Belgrade.²⁵⁵ This attack resulted in more than a dozen civilian casualties.²⁵⁶ The facilities were of dual use: civilian broadcasting but also part of the Serbian army Command, Control and Communications network.²⁵⁷ The competent ICTY Committee of Review, in its *Final Report of Review of the NATO Bombing* (hereinafter *Final Report*), was of the opinion, that should the Serbian army have used the facilities for hostile purposes, the RTS constituted a legitimate target.²⁵⁸ Nevertheless, this shelling by the allied forces remains very controversial.²⁵⁹ Further attacks on media facilities during armed conflicts include the bombing of the Arab television station Al Jazeera in Kabul by US

²⁴⁸ GD Solis op cit (n240) 534-535.

²⁴⁹ I Fisher 'Bombing site fuels politics of bitterness' *The New York Times* 17 February 2003, available at <http://link.galegroup.com/apps/doc/A97812423/AONE?u=unict&sid=AONE&xid=04a8a417>, accessed 4 November 2018.

²⁵⁰ GD Solis op cit (n240) 534.

²⁵¹ I Fisher op cit (n249).

²⁵² GD Solis op cit (n240) 535.

²⁵³ Ibid.

²⁵⁴ A Ballguy-Gallois op cit (n10) 10.

²⁵⁵ GD Solis op cit (n240) 535.

²⁵⁶ Ibid.

²⁵⁷ A Ballguy-Gallois op cit (n10) 10-11.

²⁵⁸ ICTY, *Final Report* op cit (n23) paras 71-79.

²⁵⁹ GH Aldrich 'Yugoslavia's Television Studios as Military Objectives' (1999) 1 International Law Forum 149; MN Schmitt 'Targeting and Humanitarian Law: Current Issues' (2003) 33 Israel Yearbook on Human Rights 69.

forces on 12 November 2002.²⁶⁰ The US military claimed the facilities housed offices belonging to the Taliban and Al-Qaeda and were thus of dual use.²⁶¹ In March and April 2003, during the Iraq War, the Coalition forces shelled the Information ministry in Baghdad (27 March 2003) although it accommodated international media offices and Hotel Palestine (8 April 2003), where Iraqi officials as well as foreign press personnel gathered.²⁶²

In accordance with the view taken by the ICTY Committee, all of these and other attacks on media facilities which qualify as dual-use targets are legal under IHL.

b. Broadcasting of Propaganda

Another related question is if the use of a media facility for propaganda is enough to make it a dual-use target and thus legal military objective. There is no universally accepted definition of the term propaganda in international law.²⁶³ Instead of using a social science definition,²⁶⁴ the term ‘propaganda’ is understood here by means of the general use of the word as follows: any systematic, widespread distribution of specific ideas, doctrines, practises – often withholding facts or emphasising only one way to look at the facts – by an organised group or government to further an own cause or to damage an opposing one.²⁶⁵

With regard to the RTS bombing in Belgrade, NATO representatives claimed that aside from the use of the media facilities by the Serbian army to command, control and communicate, solely the dissemination of propaganda by RTS had rendered it a legal military target in the sense of article 52(2) AP I.²⁶⁶ This opinion is based on a

²⁶⁰ A Ballguy-Gallois op cit (n10) 11.

²⁶¹ Ibid.

²⁶² A Ballguy-Gallois op cit (n10) 10.

²⁶³ See eg JT Powell ‘Towards a Negotiable Definition of Propaganda for International Agreements Related to Direct Broadcast Satellites’ (1982) 45 *Law & Contemporary Problems* 3; the following texts deal with the problem of the legality of the RTS bombing by NATO forces if based on a propaganda accusation without ever giving a definition of propaganda: SA Nohrstedt, S Kaitatzi-Whitlock, R Ottosen, K Riegert ‘From the Persian Gulf to Kosovo: War Journalism and Propaganda’ (2000) 15 *European Journal of Communication* 383 as well as the ICTY *Final Report* op cit (n23).

²⁶⁴ See eg EH Henderson ‘Toward a Definition of Propaganda’ (1943) 18 *The Journal of Social Psychology* 83: ‘Propaganda is any anti-rational process consisting of pressure-techniques deliberately used to induce the propagandee to commit himself, before he can think the matter over freely, to such attitudes, opinions, or acts as the propagandist desires of him’.

²⁶⁵ Combination of definitions given by the Cambridge Dictionary, available at <https://dictionary.cambridge.org/dictionary/english/propaganda?q=Propaganda>, accessed 5 November 2018 and the Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/propaganda>, accessed 5 November 2018.

²⁶⁶ ICTY, *Final Report* op cit (n23) para 74.

doctrine of a ‘total war’ that considers the morale of the enemy a military target.²⁶⁷ However, this concept of a ‘total war’ was already rejected by the Nuremberg Military Tribunal because in such a case ‘the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity’.²⁶⁸ In accordance with this notion and in keeping with the *telos* of the Protocol, article 52 AP I cannot be interpreted so broadly that propaganda by itself could justify a military attack of a civilian media facility.²⁶⁹ Consistently, the ICTY Committee took the view that media facilities do not constitute military targets because of the distribution of propaganda, despite its support of the war efforts.²⁷⁰ In general, the spirit of the population is not a military objective.²⁷¹ By now, this opinion is adopted by the NATO as well.²⁷²

Notwithstanding this notion, the dissemination of propaganda may amount to a dual-use of the media facility should it incite crimes under international law, especially war crimes.²⁷³ In 1994, during the civil war in Rwanda, the broadcaster *Radio Télévision Libre des Mille Collines* (hereinafter RTLM) and the newspaper *Kangura* incited to genocide.²⁷⁴ However, when the International Criminal Tribunal for Rwanda (hereinafter ICTR) dealt with the cases of *Prosecutor v. Ferdinand Nahimana et al* (‘Media Case’) and *Prosecutor v. Georges Ruggiu*, it did not comment on whether the incitement to genocide had turned the respective media facilities into dual-use objects and thus into military targets.²⁷⁵ In fact, the incitement to international

²⁶⁷ K von Clausewitz *On War* (1976) 591-592.

²⁶⁸ International Military Tribunal of Nuremberg *Trial of the Major War Criminals (1945-1946)* Judgement 227, available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf, accessed 5 November 2018.

²⁶⁹ Amnesty International ‘NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force’ (2000) 45-46, available at <https://www.amnesty.org/download/Documents/140000/eur700182000en.pdf>, accessed 5 November 2018.

²⁷⁰ ICTY, *Final Report* op cit (n23) paras 74, 76.

²⁷¹ ICTY, *Final Report* op cit (n23) paras 55, 76.

²⁷² NATO Parliamentary Committee Assembly Reports, Civilian Affairs Committee, 45th annual session, Volker Kröning (Germany) ‘*Kosovo and International Humanitarian Law*’ (1999) para 18.

²⁷³ I Henderson *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (2009) 138.

²⁷⁴ JM Kamatali ‘Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide’ (2002) 38 *Stanford Journal of International Law* 67-69.

²⁷⁵ ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (ICTR-99-52-T), Judgment and Sentence of 3 December 2003, available at <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-52/trial-judgements/en/031203.pdf>, accessed 5 November 2018 and ICTR, *Prosecutor v. Georges Ruggiu* (ICTR-97-32-I), Judgment and Sentence of 1 June 2000, available at <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-32/trial-judgements/en/000601.pdf>, accessed 5 November 2018.

crimes is an ‘effective contribution to military action’ as per article 52(2) AP I and therefore renders the Rwandan media facilities in these cases military objects.²⁷⁶ In its *Final Report*, the ICTY also expressed this opinion, namely that in situations where ‘the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective’.²⁷⁷

3. Measures of Precaution

As civilians and civilian objects, journalists and media facilities profit from the highest possible protection during armed conflict.²⁷⁸ Armed forces have to conform to the obligation of precaution when military attacks include consequences for civilians or civilian objects.²⁷⁹ This obligation comprises compliance with the principle of proportionality, articles 51(5)(b) and 57(2)(a)(iii) AP I,²⁸⁰ as well as the obligation of warning, article 57(2)(c) AP I.

According to article 57(2)(c) AP I, ‘effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit’.²⁸¹ The NATO bombing of the RTS building was criticised for non-compliance with the obligation to warn the civilian population in advance.²⁸² NATO representatives justified this violation on the grounds that this was necessary to not endanger the lives of the soldiers.²⁸³ This practical example shows how the principle of military necessity limits the obligation to warn in advance.²⁸⁴ Beyond that, an advance warning is *inter alia* dispensable ‘when the element of surprise is a condition of the success of an attack’.²⁸⁵

²⁷⁶ A Ballguy-Gallois op cit (n10) 12.

²⁷⁷ ICTY, *Final Report* op cit (n23) para 55.

²⁷⁸ A Ballguy-Gallois op cit (n10) 13.

²⁷⁹ Ibid.

²⁸⁰ See above Chapter 2 IV 3. c. (2) i., 27-28 and 37 of this thesis.

²⁸¹ This rule was already included *inter alia* in article 19 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at <https://ihl-databases.icrc.org/ihl/INTRO/110>, accessed 5 November 2018.

²⁸² Amnesty International op cit (n269) 59.

²⁸³ Ibid., 44.

²⁸⁴ A Ballguy-Gallois op cit (n10) 17.

²⁸⁵ Ibid.

4. IHL Protection under Customary International Law and during NIAC

This section analyses the scope of the protection of journalists and media facilities under CIL which are applicable during NIAC.

a. Customary IHL

During armed conflict, civilians, who are not taking direct part in the hostilities, are protected under customary IHL.²⁸⁶ Moreover, the comprehensive ICRC study on customary IHL found that the protection of journalists as civilians is also a well-established customary rule.²⁸⁷

With regard to the protection of media facilities, it is to be said that the definition of civilian objects given in article 52 AP I is drawn from CIL.²⁸⁸ The role that civilian objects need to be afforded protection and only military objects constitute lawful objectives of military attacks is recognised in CIL.²⁸⁹ However, the presumption of civilian use is no established customary law rule.²⁹⁰

b. Protection during NIAC

Journalists or media facilities are not mentioned in a treaty applicable to NIAC.²⁹¹ Even though there are no special regulations concerning journalists or media facilities, journalists are still civilians and media facilities still civilian objects under CIL and thus protected as such during a NIAC.²⁹² This customary protection includes the obligation of precaution for armed forces when attacking civilians or civilian objects.²⁹³ The principle of proportionality has become a rule of CIL, at latest after

²⁸⁶ ICRC, Study on Customary International Humanitarian Law, rules one and six, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>, accessed 6 November 2018.

²⁸⁷ ICRC, Study on Customary International Humanitarian Law op cit (n286) rule 34.

²⁸⁸ ICRC, *Report on international humanitarian law and the challenges of contemporary armed conflicts*, 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8-10 December 2015, 33, available at [file:///C:/Users/Test/Downloads/32ic-report-on-ihl-and-challenges-of-armed-conflicts%20\(I\).pdf](file:///C:/Users/Test/Downloads/32ic-report-on-ihl-and-challenges-of-armed-conflicts%20(I).pdf), accessed 2 November 2018.

²⁸⁹ Sandoz, Swinarski, Zimmermann *Commentary* op cit (n22) 631.

²⁹⁰ A Ballguy-Gallois op cit (n10) 7.

²⁹¹ K Dörmann 'International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflict' (2007) ICRC, available at <https://www.icrc.org/eng/resources/documents/article/other/media-protection-article-.htm>, accessed 7 November 2018.

²⁹² JM Henckaerts, L Doswald-Beck 'Customary International Humanitarian Law' (2009) Volume I 115-118, available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>, accessed 7 November 2018.

²⁹³ A Ballguy-Gallois op cit (n10) 14-16.

World War II and with validity both for IACs and NIACs,²⁹⁴ while the obligation of advance warning is an older customary rule.²⁹⁵

As in an IAC, the civilian protection of an individual journalist is only forfeited if and for the time that a journalist takes direct part in the hostilities.²⁹⁶ In a NIAC, however, especially if non-state terrorist groups are involved, states tend to resort to generalising classifications of regime critics as ‘terrorists’. This practice is supported by the lack of a definition of ‘terrorist’ in international law.²⁹⁷ For instance, in the February 2012 attack of the media centre in Homs by the Syrian army, which resulted in the death of journalists Marie Colvin and Rémi Ochlik, reliable sources show that the journalists were labelled ‘terrorists’ and that their whereabouts were monitored by the Syrian government beforehand.²⁹⁸

Regarding the protection of civilian journalists, the state authorities of the state of which the individual is a national, or in which he or she resides, or where her or his employer is located, are obliged to issue an identity card, stating the civilian status, in accordance with article 79(3) AP I.²⁹⁹ Since the issuing of the identity card is a state obligation, journalists engaged in dangerous professional missions are also entitled to such an identity card which shows their civilian status during a NIAC.³⁰⁰

5. Conclusion

Journalists and media facilities are immune under civilian protection unless they participate directly in the hostilities. However, IHL protects journalists and media

²⁹⁴ See for the view of legal scholars eg JG Gardam ‘Proportionality and Force in International Law’ (1993) 87 American Journal of International Law 401; See for confirmation in international case law eg ICTY, *Prosecutor v. Milan Martić* (IT-95-11-R61) Decision of 8 March 1996 para 18, available at <http://www.icty.org/x/cases/martictdec/en/960308.pdf>, accessed 8 November 2018.

²⁹⁵ A Ballguy-Gallois op cit (n10) 18-19.

²⁹⁶ JM Henckaerts, L Doswald-Beck op cit (n296) 116.

²⁹⁷ The Ad Hoc Committee by the UNGA to work on a draft for a Comprehensive Convention on International Terrorism presented a definition of ‘terrorism’ in 2002 but is not accepted by states to date: Report of the Ad Hoc Committee established by GA resolution 51/210 of 17 December 1996 Sixth session (28 January-1 February 2002), Supplement No. 37 (A/57/37), Annex II available at <http://www.un.org/documents/ga/docs/57/a5737.pdf>, accessed on 01 September 2018.²⁹⁷

²⁹⁸ D Priest ‘War reporter Marie Colvin was tracked, targeted and killed by Assad’s forces, family says’ 9 July 2016 *The Washington Post*, available at https://www.washingtonpost.com/world/national-security/war-reporter-marie-colvin-was-tracked-targeted-and-killed-by-assads-forces-family-says/2016/07/09/62968844-453a-11e6-88d0-6adee48be8bc_story.html?utm_term=.3cec1a47c640, accessed 4 November 2018.

²⁹⁹ Great Britain, UK Ministry of Defence op cit (n213) 149 para 8.18.

³⁰⁰ S Sivakumaran op cit (n50) 312.

facilities only from harmful effects of armed conflict and not their right to seek, obtain and disseminate information.

Moreover, journalists in situations of armed conflicts are at the forefront of the fighting and thus often in more danger than normal civilians. Although the protection standard of civilians is the highest standard possible, it is not suited as the sole protection for journalists in armed conflicts. Hence, there should be a special status for protection for journalists.

In a democracy, free media providing information to the society plays a pivotal role and is sometimes even referred to as the ‘fourth power’.³⁰¹ Given this high importance of free journalism, particularly during times of armed conflicts, it is regrettable, that in 1977 the Diplomatic convention decided against a special IHL Convention regarding the protection of journalists and media facilities as well as against a special protection status. As will become apparent in the next section, the abundance of relevant soft law provisions since 1977 shows that there is a huge necessity for clarity and new regulations in this regard. In conclusion, it is to recommend that in addition to the existing provisions in IHL, a special binding convention, with validity both for IAC and NIAC needs to be adopted.

C. International Soft Law

Apart from the several protection standards and mechanisms in international law elaborated in this chapter, there is a multitude of non-binding, international soft-law documents regarding the safety of journalists that have emerged within the last decades. Most of these instruments attempt to fill the gaps within the existing, binding law system and provide entry points for further action.³⁰²

On international level, the UN – as well as other institutions –³⁰³ advocated for a better protection of journalists in form of declarations by the Secretary-General³⁰⁴ or

³⁰¹ C Zanghì op cit (n226) 150.

³⁰² C Heyns, S Srinivasan ‘Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement’ (2013) 35 *Human Rights Quarterly* 317-318.

³⁰³ See for a more comprehensive overview as per 2013: C Heyns, S Srinivasan op cit (n302) 317-320.

³⁰⁴ See eg UN Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Document S/2009/277 (2009), available at <https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/POC%20S2009277.pdf>, accessed 7 November 2018.

Resolutions by the General Assembly.³⁰⁵ Moreover, the UN Human Rights Council, the UN High Commissioner for Human Rights and the UN Human Rights Committee addressed the safety of journalists.³⁰⁶ In addition, the UN together with several regional institutions, published a joint declaration on this topic.³⁰⁷

On regional level, some institutions have gone even further than only adopting declarations and resolutions but have installed mechanisms to monitor and promote the safety of journalists. To mention some recent examples, the African Union (hereinafter AU) committed to creating a *Working Group for Safety of Journalists* in May 2018.³⁰⁸ At the same time, the Council of Europe launched a *Platform to Promote the Protection of Journalism and Safety of Journalists*, which contains current news regarding the protection of journalists and media facilities as well as thematic factsheets including the jurisprudence of the European Court of Human rights.³⁰⁹

D. Validity of HRL concerning the protection of Journalists and Media Facilities during Armed Conflict

In general, IHL is *lex specialis* in times of armed conflict. However, it is silent on several rights of journalists such as the freedom of expression or the freedom to seek and obtain information. Moreover, HRL allows for a derogation of these rights in times of armed conflict. As stated above, IHL is not suited to grant journalists and media facilities the best possible protection. Although they are protected as civilians and civilian objects, due to their work and use, they are more at danger of attack than the

³⁰⁵ See eg UNGA Resolution ‘The Safety of Journalists and the Issue of Impunity’ (2017) UN Doc. A/C.3/72/L.35/Rev.1., available at <https://undocs.org/A/C.3/72/L.35/Rev.1>, accessed 7 November 2018.

³⁰⁶ See eg UN Human Rights Council Resolution 21/3, UN Doc. A/HRC/21/L.6 (2012), paras 1–3, available at <https://daccess-ods.un.org/TMP/5887950.65879822.html>, accessed 7 November 2018; UN Commissioner for Human Rights Resolution 13/10 paras 9, 55–59, 69–70, UN Doc. A/HRC/13/62 (2010), available at <https://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.1.pdf>, accessed 7 November 2018; UN Human Rights Committee, No. 34, *Article 19: Freedoms of Opinion and Expression, General Remarks, adopted* 12 Sept. 2011, UN Doc. CCPR/C/GC/34 (2011) 23, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed 7 November 2018.

³⁰⁷ Joint Declaration op cit (n2).

³⁰⁸ UNESCO ‘African Union Committed to a Working Group for Safety of Journalists’ (2018) available at <http://www.unesco.org/new/en/member-states/single-view/news/african-union-committed-to-a-working-group-for-safety-of-jou/>, accessed 8 November 2018.

³⁰⁹ Council of Europe, *Platform to Promote the Protection of Journalism and Safety of Journalists*, available at <https://www.coe.int/en/web/media-freedom/-/new-issue-of-safety-of-journalists-weekly>, accessed 8 November 2018.

rest of the civilian population or many other civilian objects; in some cases, they even encounter the same risks as members of the armed forces.³¹⁰

Considering the lack of IHL regulations with regard to other rights of journalists, the HRL protection of the right to life is very important for the protection of journalists and media facilities, as it is a non-derogable provision. As established in Chapter two of this thesis, HRL only protects the individual from an ‘arbitrarily’ killing.³¹¹ In general, this excludes a protection from killings that are in compliance with IHL. Since this HRL guarantee does not cease to apply during times of armed conflict and comprises the indefinite legal term ‘arbitrarily’, the *lex specialis* principle can be applied as a rule of interpretation for the HRL provision in light of IHL.³¹² In order to do so, the notions of proportionality and military necessity are very important.³¹³

War correspondents, journalists engaged in dangerous professional missions and embedded journalists are civilians while media facilities are civilian objects. Thus they constitute no legitimate targets for a military attack. The killing of a journalist belonging to one of those categories would therefore be a violation of IHL and consequently also arbitrarily in the sense of HRL provisions.

Should a legal military attack lead to the death of journalists as casualties or should a media facility be of dual-use and therefore attacked during an armed conflict, the military is obliged to take measures of precaution. As a result, the IHL principles of proportionality and military necessity are important for the assessment of the attack’s legality under IHL.³¹⁴ In IHL, all requirements to minimise casualties and damage to civilian objects, namely the requirements of proportionality and measures of precaution, are limited by military necessity. In other words, an accordingly high military necessity could justify almost any attack. Nevertheless, chapter three of this thesis found that an interpretation of the term ‘arbitrary’ solely based on IHL reaches its limits if IHL itself includes indefinite legal concepts.³¹⁵ In addition to the examples given above,³¹⁶ the obligation of precaution includes indefinite concepts, such as in article 57(2)(c) AP I, which establishes the duty of advance warning ‘unless

³¹⁰ Sandoz, Swinarski, Zimmermann op cit (n22) para 3245.

³¹¹ Article 6(1) ICCPR, article 4 ACHPR and article 4(1) IACHR; article 2 ECHR does not include such a restriction but contains an exception for deaths resulting from lawful acts of war in article 15(2) ECHR.

³¹² See Chapter two 26-30.

³¹³ Ibid.

³¹⁴ See Chapter three 37, 40-41.

³¹⁵ Chapter three, 29.

³¹⁶ Ibid.

circumstances do not permit'. It is through these uncertainties in IHL that HRL values are preserved. This leads to a joint application of both IHL and HRL standards in these situations. As a result, a military attack, for instance against a dual-use media facility, should only be carried out if it is the last resort and civilian casualties are minimised (HRL principle of proportionality). However, this principle should be restricted by the IHL principle of military necessity. That means that only if the lesser means, for example interrupting the broadcasting, would cause a huge risk for a military operation, it may be derogated from the strict HRL principle of proportionality.

E. Conclusion

With regard to the second research question of this thesis 'Which laws, under either IHL or HRL, protect journalists and media facilities during an armed conflict', it can be found that firstly, only HRL provisions protect the way to work of journalists. Secondly, these provisions may be derogated from in times of armed conflict. IHL lacks special protection for journalists or media facilities but protects them as civilians and civilian objects. Only war correspondents are entitled to prisoner-of-war status upon capture.

Attacks on civilians and civilian objects are generally prohibited under IHL but allowed in cases of outweighing military necessity. If an attack is legal in terms of IHL, any deaths resulting from it are not 'arbitrarily' in light of HRL. In these cases, the compliance of the individual attack with IHL is assessed by means of the principles of proportionality and precaution. Because these IHL principles contain several indefinite legal terms and concepts, these gaps make way for an inclusion of HRL values in the assessment.

IV. *DE FACTO* PROTECTION OF JOURNALISTS AND MEDIA FACILITIES: PRACTICAL EXAMPLES

This chapter deals with the third research question and provides an assessment of the extent to which journalists and media facilities are effectively protected by the legal framework investigated in Chapters two and three and if the afore specified *de jure* protection is *de facto* reflected in reality. This assessment includes both the compliance with the protection under HRL regarding the work and purpose of the media as well as the IHL protection of journalists and media facilities as civilians and civilian objects.

In a first step, this chapter provides an analysis of the general *de facto* protection of journalists and media facilities based on the example of the ongoing conflict in South Sudan, because in the course of this conflict, numerous violations of journalists' rights occurred and still occur. The analysis takes the data and events portrayed in the recently published joint *Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis* by the Human Rights Division of the UN Mission in South Sudan (hereinafter UNMISS) and the Office of the UN High Commissioner for Human Rights (hereinafter OHCHR) into account.³¹⁷

In a second step, this chapter separately focuses on the protection of female journalists and media personnel reporting on conflicts and working in conflict zones. Given that the number of female journalists who were killed in 2017 doubled compared to the preceding years, this is a very important aspect which is often neglected. Moreover, gender-based difficulties, impediments to the journalistic work and rights violations are examined in order to shed some light on this often marginalised and invisible group of reporters during times of armed conflict. Both the *de facto* protection under HRL guarantees as well as the *de facto* protection as civilians under IHL is critically reviewed from a feminist point of view.

³¹⁷ UN, *Report South Sudan* op cit (n24).

A. Safety of Journalists and Media Facilities during the South Sudan Conflict

1. The Conflict in South Sudan

In July 2011, South Sudan gained independence from Sudan.³¹⁸ Since its independence, there was constant conflict, however, on 15 December 2013, intense fighting broke out between the ruling Sudan People's Liberation Army (hereinafter SPLA) supporting President Salva Kiir and dissidents of the same party in support of Vice President Riek Machar, known as Sudan People's Liberation Movement/Army-in-opposition (hereinafter SPLMA).³¹⁹ The fighting spread from Juba to other areas and is for the most part along ethnic lines, as SPLA fighters mostly come from the country's largest ethnic group Dinka while SPLMA fighters from the second largest group Nuer.³²⁰ Within a few days, the hostilities amounted to a NIAC fulfilling the relevant conditions.³²¹ First, the SPLMA is a non-state armed group exceeding the needed level of organisation and second, the fighting soon reached an intensity going beyond mere internal disturbances (by 26 December 2013, at least 121,600 people were displaced and at least 1,000 killed).³²² The end of the conflict is not foreseeable since a Peace Agreement from August 2015 finally collapsed in July 2016,³²³ and a Cessation of Hostilities Agreement from December 2017 was already repeatedly violated in January 2018.³²⁴

2. Protection of Journalists and Media Facilities On-Site

As during most armed conflicts, free press is heavily attacked in South Sudan. For instance, a public official addressed a forum of journalists in Juba in December 2017

³¹⁸ BBC 'South Sudan Country Profile', 6 August 2018, available at <https://www.bbc.com/news/world-africa-14069082>, accessed 10 November 2018.

³¹⁹ L Themnér, P Wallensteen 'Armed Conflicts, 1946-2013' (2014) 51 *Journal of Peace Research* 546; The Rule of Law in Armed Conflicts project (hereinafter RULAC) 'Non-International Armed Conflict in South Sudan' (2018) available at <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-south-sudan#collapse4accord>, accessed 10 November 2018.

³²⁰ L Themnér, P Wallensteen op cit (n319) 546.

³²¹ RULAC, NIAC in South Sudan op cit (n319).

³²² UN Security Council, Report of the Secretary-General on South Sudan, 6 March 2014, S/2014/158, available at <http://undocs.org/S/2014/158>, accessed 11 November 2018.

³²³ Human Rights Watch 'South Sudan: Killings, Rapes, Looting in Juba' (2016), available at <https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba>, accessed 11 November 2018.

³²⁴ UN News 'South Sudan: Ceasefire violations, hostile propaganda undercut regional peace push, Security Council told' (2018), available at <https://news.un.org/en/story/2018/01/1001121>, accessed 11 November 2018.

as follows: ‘You go to the extreme. Stick to the rules and ethics and we’ll have no problem with you. Tell us the beauty about this country. It cannot be all “bad bad”. Otherwise we will look at you as someone with a hidden agenda.’³²⁵

In total, at least ten journalists have been killed (mostly through deliberate targeting) in South Sudan since 2011, with two of them being women.³²⁶ Between July 2016 to December 2017, there were several abductions and arrests of journalists and nine media facilities were restricted from working, with three closed for reporting on topics like the political climate, corruption, civilian casualties, conflict-related sexual violence etc.³²⁷ Consequently, South Sudan is ranked 144 out of 180 countries in the World Press Freedom Index for 2018.³²⁸

a. Government Attacks on the Free Press

The South Sudanese government has adopted several measures to obstruct the work of journalists and media facilities.

For one thing, the South Sudanese government attacks the free press through censoring. For instance, security officials were embedded with media facilities.³²⁹ Moreover, in some regions, journalists now need prior approval from state authorities before publishing or broadcasting news.³³⁰ Also, several websites were blocked by the government.³³¹ According to the information available to the Human Rights Division of UNMISS, this censoring through blocking of the websites is in violation of HRL.³³² In addition, some media facilities were closed,³³³ or their work suspended.³³⁴

³²⁵ UN, *Report South Sudan* op cit (n24) 1.

³²⁶ RSF ‘South Sudan: String of Murders since 2011’, available at <https://rsf.org/en/south-sudan>, accessed 11 November 2018; UNESCO ‘UNESCO Condemns Killing of Journalists Assassinated Journalists in South Sudan’ (2017), available at https://en.unesco.org/sites/default/files/unesco_condemns_killing_of_journalists_south_sudan_en.pdf, accessed 11 November 2018.

³²⁷ UN, *Report South Sudan* op cit (n24) 2, 13.

³²⁸ RSF, World Freedom Index 2018, available at <https://rsf.org/en/ranking>, accessed 11 November 2018.

³²⁹ UN, *Report South Sudan* op cit (n24) 15.

³³⁰ Ibid., 16.

³³¹ Ibid., 17.

³³² Ibid., 18.

³³³ For instance the newspapers Juba Monitor and Al-Watan: UNMISS/OHCHR ‘Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016’ (2017) paras 81-83, available at <https://www.ohchr.org/Documents/Countries/SS/ReportJuba16Jan2017.pdf>, accessed 11 November 2018.

³³⁴ The work of Al-Jazeera English was suspended for more than two weeks: RSF ‘Al-Jazeera English suspended in South Sudan’ (2017), available at <https://rsf.org/en/news/al-jazeera-english-suspended-south-sudan>, accessed 11 November 2018.

Furthermore, media equipment or publications were confiscated by government agents in several cases.³³⁵

Additionally, the government requested all media facilities (broadcast, print media and printing companies) to register with the Media Authority in order to obtain a ‘media operational licence’ on 15 June 2017.³³⁶ This registration involves the payment of considerably high fees.³³⁷

b. The Government’s Violations of the Protection afforded to Journalists

In January 2015, five journalists were killed in an ambush on a political convoy, two of them being women.³³⁸ Since the outbreak of violence in July 2016, three journalists reporting on the conflict were killed. The casualties included two South Sudanese reporters in 2016: Isaac Vuni, the circumstances of whose death are still unclear, and Gatluak Manguet Nhial, who was killed by SPLA soldiers because of his ethnicity.³³⁹ In 2017, US American freelance reporter Christopher Allen was killed while covering a fighting between SPLA and SPLMA by a shot to the head.³⁴⁰ He was embedded with the armed forces of the SPLMA and was wearing a vest clearly marked ‘Press’ when he was shot.³⁴¹ However, the South Sudanese ‘Information Minister said he felt no responsibility for Allen’s death because he died alongside his rebel comrades’.³⁴² All of these deaths are both in violation of HRL obligations as well as the IHL protection standard of journalists as civilians.

Furthermore, journalists’ right to personal security and liberty is endangered in South Sudan since several journalists were arbitrarily arrested and detained by government officials throughout the period of the fighting; some arrests even included violent interrogations and torture.³⁴³ Most of the journalists had previously published something ‘critical of the government’.³⁴⁴

³³⁵ UN, *Report South Sudan* op cit (n24) 18.

³³⁶ Ibid., 19.

³³⁷ Ibid., the amount of the fees is between 30,000 and 300,000 South Sudanese Pounds.

³³⁸ Article 19 ‘Safety and Protection: Baseline Survey of Journalists in South Sudan’ (2016) 7, available at <https://www.article19.org/data/files/medialibrary/38760/Safety-and-Protection---Baseline-Survey-of-Journalists-in-South-Sudan.pdf>, accessed 11 November 2018.

³³⁹ Ibid.

³⁴⁰ Ibid., 19-20; RSF ‘Journalists Killed’ (2017), available at <https://rsf.org/en/journalists-killed>, accessed 11 November 2018.

³⁴¹ RSF ‘Journalists Killed’ op cit (n340).

³⁴² Ibid.

³⁴³ UN, *Report South Sudan* op cit (n24) 20-21.

³⁴⁴ Ibid., 20.

Besides that, severe threats, harassment and intimidation of journalists by state agents forced multiple journalists to flee the country or go into hiding.³⁴⁵ Apart from that, many journalists admitted to practicing self-censorship, fearing for their safety.³⁴⁶

In total, due to all these different forms of rights violations, over 85 per cent of journalists in South Sudan said their ability to report professionally was affected in 2016.³⁴⁷ All violations of journalists rights and attacks on free press must be prevented, because in times of armed conflict, the media tends to be abused to serve as ‘mouthpieces of the authorities by amplifying their voices and muffling those that differ from the official position’.³⁴⁸

B. Protection of Female Journalists in times of Armed Conflict

Both HRL and IHL do not include any provisions referring to female journalists, although women have covered events of armed conflicts dating back to 1849 when Margaret Fuller reported on the invasion of Rome by the French forces of Napoleon.³⁴⁹ In 2017, the death toll of female journalists has increased from the 2016 figure of ten per cent to 14 per cent of all journalists killed.³⁵⁰ Thus, in a first step, this section analyses the protection of women journalists within the legal framework as well as the importance of their work, especially in conflict areas. In a second step, concrete gender-based impediments to the journalistic work of women are presented.

³⁴⁵ Ibid., 21.

³⁴⁶ Ibid.

³⁴⁷ Article 19 op cit (n338) 5.

³⁴⁸ C Ntulumbe ‘Justified Mission? Press Coverage of Uganda’s Military Intervention in the South Sudan Conflict’ in KS Orgeret, W Tayeebwa (eds) *Journalism in Conflict and Post-Conflict Conditions: Worldwide Perspectives* (2016) 58.

³⁴⁹ International Women’s Media Foundation (hereinafter IWMF) and International News Safety Institute (hereinafter INSI) ‘Violence and Harassment Against Women in the News Media: A Global Picture’ (2014) 3, available at <https://www.iwmf.org/wp-content/uploads/2018/06/Violence-and-Harassment-against-Women-in-the-News-Media.pdf>, accessed 12 November 2018.

³⁵⁰ UNESCO ‘Punish the Crime, not the Truth Highlights from the 2018 UNESCO Director-General’s Report on the Safety of Journalists and the Danger of Impunity’ (2018) 5, available at https://en.unesco.org/sites/default/files/unesco_dg_report_2018_highlights_en.pdf, accessed 12 November 2018; D Selby ‘2017 Was Especially Dangerous for Female Journalists’ (2017) *Global Citizen*, available at <https://www.globalcitizen.org/en/content/journalists-killed-press-freedom-women/>, accessed 12 November 2018.

1. Importance and Legal Consideration of Women Journalists in Times of Armed Conflicts

a. Importance of Women Journalists

When it comes to reporting about foreign affairs and national security, female journalists are essentially underrepresented in the media.³⁵¹ This is all the more true for reporting in situations of armed conflict, which ‘tends to be not only by men, but about men, meaning we rarely get to hear equally important female narratives’.³⁵² In particular, the lack of women journalists leads to an abundance of stories untold – to which men sometimes do not even have access.³⁵³ Nevertheless, women reporters face more risks than men when working in conflict zones.³⁵⁴ In addition to the risks posed by the ongoing conflict – which are equal for men and women – female journalists are more exposed than men and often constrained through cultural norms and practices.³⁵⁵

Despite all these dangers, women journalists in times of war are essential for a complete coverage of a conflict. Particularly western women journalists working in conservative countries are often perceived ‘as something inbetween a man and a woman ... [and thus] can both speak to the men and ... can enter the female areas where no men are allowed.’³⁵⁶ Hence women journalists have ‘access to a broader spectrum of voices and perspectives’.³⁵⁷ This is highly important, given that women bear the major burden of armed conflict.³⁵⁸ Moreover, the representation of women in armed conflicts is important to reduce the harmful worldwide notion that ‘many of the traditional female roles are still considered “private”, as opposed to the more public

³⁵¹ See for 2016 data for the USA: Foreign Policy Interrupted ‘Why We Exist’, available at <http://www.fpininterrupted.com/why-we-exist/>, accessed 12 November 2018.

³⁵² A Bradford ‘What It’s Like to be a Female War Correspondent In the Middle East’ (2017) *The Establishment*, available at <https://medium.com/the-establishment/what-its-like-to-be-a-female-war-correspondent-in-the-middle-east-6c410e326463>, accessed 12 November 2018.

³⁵³ Ibid.

³⁵⁴ KS Orgeret ‘Women in War. Challenges and Possibilities for Female Journalists Covering Wars and Conflicts’ in: U Carlsson *Freedom of Expression and Media in Transition: Studies and Reflections in the Digital Age* (2016) 166.

³⁵⁵ Ibid., 167.

³⁵⁶ Ibid., 170.

³⁵⁷ Ibid., 171.

³⁵⁸ ICRC, statement to the Fourth World Conference on Women, Beijing, China, 4 Sept. 1995, available at <https://www.icrc.org/en/doc/resources/documents/statement/57jmkq.htm>, accessed on 3 January 2019; UN, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, paras 131-149, 27 October 1995, UN Doc. A/CONF. 177/20, available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>, accessed on 03 January 2019; J Gardam, H Charlesworth ‘Protection of Women in Armed Conflict’ (2000) 22 *Human Rights Quarterly* 148.

masculine sphere’.³⁵⁹ A positive example of the presence of female journalists during armed conflict was the attention brought to the trauma following the mass of sexual violence during the conflict in the Former Yugoslavia.³⁶⁰ All in all, ‘we must be grateful for getting a view on troubled times that is not dictated only by men and the military’.³⁶¹

b. Protection of Female Journalists in Times of Armed Conflict under HRL and IHL

Since there are no special provisions for female journalists, they are generally protected as civilian women during times of armed conflict. Only about 7 per cent of the 560 articles in the four GCs and the two APs pay attention to the needs of women during armed conflict.³⁶² This has not changed in recent years, although in 2000, the UN Security Council in Resolution 1325 called ‘all parties to armed conflict to take special measures to protect women and girls from gender-based violence particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict’.³⁶³ However, the numerous gender-specific rights violations of women and girls as consequences of armed conflict go far beyond sexual violence.³⁶⁴ Thus, it is very important to notice, that in addition to the general protection as civilians, female journalists’ human rights as women do not cease to apply during times of armed conflict.³⁶⁵ Despite the fact that many of these gender-specific rights violations could be read into the existing norms of IHL, there is still a gap of protection for female

³⁵⁹ KS Orgeret op cit (n354), 172.

³⁶⁰ J Gardam, H Chalesworth op cit (n358) 156.

³⁶¹ K Whitehorn ‘Why Female War Reporters are Important’ (2014) *The Guardian*, available at <https://www.theguardian.com/lifeandstyle/2014/jul/13/why-female-war-reporters-are-important-katharine-whitehorn>, accessed 12 November 2018.

³⁶² A Biehler ‘Protection of Women in International Humanitarian Law and Human Rights Law’ in: R Arnold, N Quéniwet *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008) 359.

³⁶³ UN Security Council, Resolution 1325, adopted on 31 October 2000, UN Doc. S/RES/1325 para 10, available at http://www.un.org/womenwatch/osagi/cdrom/documents/Background_Paper_Africa.pdf, accessed 12 November 2018.

³⁶⁴ B Meyerfeld ‘A Gender Perspective on the Relationship between Human Rights Law and International Humanitarian Law’ in E de Wet, J Kleffner op cit (n39) 32-42.

³⁶⁵ Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) Committee, General Recommendation 30, adopted on 18 October 2013, UN Doc. No CEDAW/C/GC/30, available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>, accessed 12 November 2018.

civilians in general and female journalists in particular.³⁶⁶ Hence, the safety of women journalists is insufficiently protected under IHL.

However, international soft law regarding the protection of women journalists is emerging. For instance, the necessity to address the specific needs of female journalists and regulate adequate protection of their rights was dealt with on 13 November 2017, when the UN General Assembly adopted a resolution acknowledging the importance of female journalists, the gender-based risks they face during work and calling upon member states to act and provide according legislation.³⁶⁷

c. The ‘Citizen-Journalist’: Weakness of Conventional Definitions

In times of armed conflicts, especially NIACs, it is increasing in frequency that fighting takes place in civilian settlements, which exposes civilians to the forefront of the hostilities. From this circumstance, combined with the spread of new technologies and the internet, emerges the relatively new group of ‘citizen journalists’.³⁶⁸ Citizen journalists in recent conflicts are mostly women,³⁶⁹ since in their traditional roles as caregivers they are the ones staying at home during armed conflict but in many cases find themselves in the middle of the fighting. Citizen journalism disseminates information mostly through blogs and videos online.³⁷⁰ They are not comprised by the conventional definition and therefore only protected as civilians. Due to their work as citizen journalists, they are sometimes more at risk than the rest of the civilian population and international law should recognise this relatively new form of journalism and provide adequate protection.

³⁶⁶ B Meyerfeld op cit (n364) 42.

³⁶⁷ UNGA, Resolution ‘The safety of journalists and the issue of impunity’, 13 November 2017, UN Doc. A/C.3/72/L.35/Rev.1, available at <https://undocs.org/A/C.3/72/L.35/Rev.1>, accessed 12 November 2018.

³⁶⁸ S Allan, E Thorsen (eds) *Citizen Journalism: Global Perspectives* (2009) Preface page x.

³⁶⁹ S Singh ‘Women Leaders Make Their Own News through Video and Blogging’ (2008) 77 *Empowering Women for Gender Equity* 82; The World Association for Christian Communication ‘Women at the Forefront of Citizen Journalism in the Philippines’ (2016), available at <http://www.waccglobal.org/articles/women-at-the-forefront-of-citizen-journalism-in-the-philippines>, accessed 12 November 2018.

³⁷⁰ S Singh op cit (n369) 82.

2. Gender-Based Impediments for Women Journalists in Times of Armed Conflicts

a. Forms of Gender-Based Rights Violations

(1) Physical Violence

When reporting from conflict zones, women are as likely as men to become victim of a (fatal) military attack. For instance, in January 2016, a military attack targeting the Afghan Television Channel *Tolo News* in Kabul killed seven journalists, including three women.³⁷¹ Furthermore, other less invasive acts of physical violence are part of the daily work of female journalists in conflict zones.³⁷²

(2) Sexual Harassment and Sexual Violence offline

Already during the Second World War, the bodies of female wartime journalists were subject to constant sexualisation and harassment. An example is the Romanian prime minister repeatedly posing the question to war correspondents: ‘When is Ann Stringer of the United Press coming back? She has the most beautiful legs in Romania’.³⁷³ This sexualisation accompanied by verbal or physical harassment continues until today. In a 2014 survey of the International Women’s Media Foundation (hereinafter IWMF) and the International News Safety Institute (hereinafter INSI) on violence and harassment against women journalists, almost half of the respondents stated that they had experienced sexual harassment in relation to their work.³⁷⁴ The vast majority of these acts were committed by ‘co-workers’, ‘supervisors’ and ‘bosses’.³⁷⁵

In the same study, over 14 per cent of the respondents had experienced sexual violence (including acts from unwanted sexual touching to rape).³⁷⁶ Contrary to sexual harassment, the majority of sexual violence acts were committed not in the office but ‘in the field’.³⁷⁷

³⁷¹ UNESCO, ‘Director-General Report on the Safety of Journalists and the Danger of Impunity’ (2018), UN Doc. CI-18/COUNCIL-31/6/REV, 10, available at <http://unesdoc.unesco.org/images/0026/002658/265828e.pdf>, accessed 12 November 2018.

³⁷² IWMF and INSI Study op cit (n349) 8.

³⁷³ KS Ogeret ‘Women Making News. Conflict and Post-Conflict in the Field’ in: KS Ogeret, W Tayebwa (eds) op cit (n348) 102.

³⁷⁴ IWMF and INSI Study op cit (n349) 9.

³⁷⁵ Ibid.

³⁷⁶ Ibid., 8.

³⁷⁷ Ibid.

Moreover, women face the danger of violent mob attacks when reporting on mass events. In May 2013, while covering an election rally in Pakistan, the journalist Quatrina Hosain got violently assaulted by a group of 30 men.³⁷⁸ In 2007, the journalist Jenny Nordberg got sexually assaulted by a group of men while covering the return of Benazir Bhutto in Pakistan.³⁷⁹

Additionally, women journalists face threats, intimidation and abuse on the grounds of their gender, such as the threat of job loss when pregnant.³⁸⁰ As the example of Afghan Journalist Sediqua Sherzai – who is operating two radio stations and a TV channel with a female reporter team in Kunduz – shows, intimidations of women journalists are often linked to conservative societies.³⁸¹ Sherzai and her team feel under ‘constant threat not only from insurgents but also from men who do not want women to work in the media’.³⁸²

(3) Online Harassment

Within the last years, women were increasingly targeted by online threats and abuse.³⁸³ Respondents of the 2014 IWFM and INSI Survey reported that more than a fourth of ‘verbal, written and/or physical intimidation including threats, to family or friends’ happened online.³⁸⁴ This online harassment often is of sexual nature.³⁸⁵ A proposed definition of online sexual harassment is centred on three core features: ‘(1) its victims are female, (2) the harassment is aimed at particular women, and (3) the abuse invokes the targeted individual’s gender in sexually threatening and degrading ways.’³⁸⁶

When it comes to online harassment, women are targeted about three times more than men on certain platforms.³⁸⁷ Dunja Mijatović, the OSCE Representative on Freedom of the Media, states that many female journalists are targeted online with

³⁷⁸ KS Orgeret *Women Making News* op cit (n373), 107-108.

³⁷⁹ Ibid., 108.

³⁸⁰ IWFM and INSI *Study* op cit (n349) 10.

³⁸¹ UN Assistance Mission in Afghanistan (hereinafter UNAMA) News ‘Women Journalists in Afghanistan Defiant in the Face of Violence’ (2018), available at <https://unama.unmissions.org/women-journalists-afghanistan-defiant-face-violence>, accessed 12 November 2018.

³⁸² Ibid.

³⁸³ IWFM and INSI *Study* op cit (n349) 14.

³⁸⁴ Ibid.

³⁸⁵ Ibid., 14-15.

³⁸⁶ DK Citron ‘Law’s Expressive Value in Combating Cyber Gender Harassment’ (2009) 108 *Michigan Law Review* 390.

³⁸⁷ KS Orgeret *Women Making News* op cit (n373) 109.

threats of killing, rape and violence on a daily basis.³⁸⁸ Most of the online attacks try to degrade the journalist as a woman and not the content of her journalism.³⁸⁹

Online (sexual) harassment also targets female journalists who report from conflict zones.³⁹⁰ Women journalists in armed conflict describe these attacks as particularly hateful of women and hard to deal with when in armed conflict and away from their usual network.³⁹¹

Online (sexual) harassment of women journalists may not only lead to emotional and physical stress, but also damage their journalistic credibility and reputation.³⁹² Out of fear for their safety, some female journalists start using a pseudonym or stop reporting about a topic entirely.³⁹³

b. Pervasive Impunity

Most of the female journalists that experienced at least one form of the abovementioned gender-based harms did not report it out of the fear that this would have a negative impact on their career.³⁹⁴ Thus, most of the rights violations of women journalists remain unpunished. There is urgent need for a legislation that addresses this issue and installs mechanisms for an effective protection of female journalists.

c. Safety Measures

Women Journalists in general and in particular those covering armed conflicts constantly take measures to avoid or deal with the abovementioned harms. Individual safety measures range from always wearing a (fake) wedding ring when reporting from conservative countries to have a rape whistle in hand.³⁹⁵

³⁸⁸ D Mijatović 'Online threats of killing, rape and violence everyday reality for too many female journalists' (2015) Index: The Voice of Free Expression, available at <https://www.indexonensorship.org/2015/08/dunja-mijatovic-online-threats-of-killing-rape-and-violence-everyday-reality-for-too-many-female-journalists/>, accessed 13 November 2018.

³⁸⁹ KS Orgeret *Women Making News* op cit (n373) 110.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² OSCE Representative on Freedom of the Media 'Factsheet: Safety of Female Journalists Online' (2018) available at <https://www.osce.org/representative-on-freedom-of-media/370331?download=true>, accessed 13 November 2018.

³⁹³ Ibid.

³⁹⁴ KS Orgeret *Women Making News* op cit (n373), 108-109; IWMF and INSI *Study* op cit (n349) 8-9.

³⁹⁵ International Association of Women in Radio and Television 'What if...? Safety Handbook for Women Journalists' (2017) available at <https://www.iawrt.org/sites/default/files/field/pdf/2017/11/IAWRT%20Safety%20Manual.Download.10112017.pdf>, accessed 13 November 2018.

To enhance the safety of local women journalists, the Association of Media Women in South Sudan (AMWISS) in cooperation with the Norwegian People's Aid (NPA) in South Sudan conducted a training of female journalists. Moreover, AMWISS created a guide with safety tips for women journalists in public places, in the offices as well as at home.³⁹⁶

Only two countries reported to UNESCO to have taken special measures on national level to increase the safety of women journalists, namely Denmark and Kenya.³⁹⁷ The latter introduces specific safety trainings for female journalists.³⁹⁸

There are no binding safety measures for women journalists on regional or international level.

C. Conclusion

The analysis provided in this chapter finds an answer to the third research question, namely to what extent journalists are effectively protected and if the *de jure* guaranteed protection is *de facto* reflected in reality. The *de jure* protection includes the protection standards of HRL regarding the work and purpose of journalists as well as the IHL protection of journalists as civilians.

The first part of chapter four examines the concrete situation of journalists in the course of the South Sudan conflict. Regarding the HRL protection of the media work, especially the right to freedom of expression, the *de facto* protection of journalists in South Sudan differs significantly from the *de jure* protection. Journalists and media facilities are heavily under attack through intimidation and assaults by the government. Moreover, journalists' protection as civilians is not effectively ensured, since abductions, torture and even killings of journalists take place. Journalists were killed during fighting although they were clearly identifiable as members of the press and thus civilians. In the NIAC in South Sudan, common article 3 GCs is applicable and contains a minimum standard of humanitarian protection to which both parties to the conflict are bound. Comprised therein is the principle of distinction, which means civilians – including journalists – must not be targeted. In conclusion, there is no effective protection of journalists, neither with regard to HRL nor IHL provisions, in the South Sudan conflict.

³⁹⁶ Information kindly provided by the AMWISS South Sudan Office.

³⁹⁷ UNESCO Highlights Report 2018 op cit (n350) 14.

³⁹⁸ Ibid.

The second part of chapter four focuses at the effective protection of women journalists as guaranteed *de jure*. Both HRL and IHL provisions do not contain specific provision protecting female journalists. Hence, women journalists are *de jure* protected as journalists or civilians in general. However, female journalists' human rights with regard to their work are *de facto* repeatedly violated through various assaults of sexual, physical or online nature. Therefore, an effective protection of the *de jure* protection under HRL is thwarted. Women journalists are also subject to illegal killings or abductions during times of armed conflict and are, to the same amount as men, not effectively protected under IHL. Furthermore, IHL fails to protect women journalists as female civilians *de facto* from gender-based rights violations. Additionally, women journalists are not considered in IHL, although they are often even more exposed than male colleagues in times of armed conflict. Also, citizen journalists, a group that disproportionately consists of women, are not included in conventional definitions of journalists and not bestowed any special protection. Finally, female journalists are not awarded a *de facto* protection according to the existing *de jure* norms. This situation is aggravated by the fact that the *de jure* protection provided is already fragmentary in terms of female journalists' safety. Therefore, there is a great need to explicitly codify special safety precautions for women journalists in IHL.

V. RESEARCH RESULTS AND RECOMMENDATIONS

1. Main Findings

Above all, the most important outcome from the research conducted in the course of this master thesis is the utmost importance of free media and press for a democracy, especially during times of armed conflict. In order to guarantee the freedom of the media and press, journalists and media facilities need to be accorded the highest protection standard possible. This thesis provides answers to the three research questions aimed at providing a comprehensive overview of the legal and effective protection of journalists and media facilities during armed conflict: (1) the applicable legal regime(s), (2) the relevant norms and standards and (3) the effective protection based on factual studies.

With regard to the first research question, it is to say that both IHL and HRL are applicable in times of an armed conflict. Although IHL is *lex specialis*, HRL does not cease to apply in general. Due to a lack of a norm conflict between individual norms of IHL and HRL, the *lex specialis* maxim can only be used in its weakest form, namely as an interpretation rule. Accordingly, in the case of a discrepancy between two protection standards of the two regulatory complexes, the HRL provision is to be interpreted in the light of the more specific IHL provision. However, such a harmonisation is only possible, if the HRL provision allows for an interpretation of an indefinite legal concept. Should the relevant IHL provision itself contain an indefinite term, HRL values are to be considered when it comes to proportionality and the principle of humanity. Nevertheless, to result in a harmonisation which is feasible in terms of military assessments, all of these considerations are limited by the principle of military necessity.

The response to the second research question provides an outline of the concrete protection afforded to journalists and media facilities under IHL and HRL. The work and working methods of journalists are only protected under HRL, particularly by the right to freedom of expression. However, most human rights treaties allow member states to derogate from this right in times of emergency. Also, the right to freedom of expression is not part of CIL. Therefore, it is very likely to not be applicable in most conflicts. This exposes journalists and media facilities to the lesser protection under IHL. IHL protects journalists and media facilities as civilians and civilian objects and hence unless they participate directly in the hostilities. Only war

correspondents are granted prisoner-of-war status upon capture. The afforded protection standard, however, is not sufficient because journalists are at the forefront of the fighting and thus often in more danger than normal civilians. In light of this lack of IHL regulations, the HRL protection of the right to life, protecting the individual from an ‘arbitrarily’ killing is very important, as it is a non-derogable provision. In this case, the *lex specialis* principle can be applied to interpret the indefinite legal term ‘arbitrarily’ in light of IHL. Attacks on civilians and civilian objects allowed in IHL when justified with military necessity. Such justified attacks are not ‘arbitrarily’ in light of HRL. To assess the legality of the individual attack, the principles of proportionality and precaution are used which allow for an inclusion of HRL values.

Relating to the third research question, it is concluded that the *de facto* protection of journalists and media facilities in armed conflict in general as well as the protection of female journalists in particular differs significantly from the *de jure* guaranteed protected outlined in the preceding chapters. The *de jure* protection includes the protection standards of HRL regarding the work and purpose of journalists as well as the IHL protection of journalists as civilians. Based on the example of the current situation for journalists and media institutions in South Sudan, it was established that effective protection is not provided according to the standards granted. As far as women journalists are concerned, there are no relevant specific provision in IHL or HRL so they are protected as civilians. Since women journalists are often subject to various gender-based assaults of sexual, physical or online nature in addition to the risks faced by men in relation to their work, they are not effectively protected according to the *de jure* guarantees.

2. Recommendations

Regarding the first research question on the systemic relationship between IHL and HRL, the *lex specialis* principle is still the most commonly used solution for a harmonisation. However, the ICJ did not mention it any more in its *Armed Activities Case*.³⁹⁹ The precise conditions of the continued validity of HRL during armed conflict is not only of high importance for the protection of journalists and media facilities, but also for the general protection of civilians and combatants. To provide certainty and prevent a legal vacuum, international law should once and for all state define the relationship between IHL and HRL – through binding legal decisions or codification.

³⁹⁹ ICJ *Armed Activities Case* op cit (n112).

In relation to the second research question, it should be noted that the protection of journalists and media facilities under IHL is insufficient, although it is equivalent to the highest possible protection available, namely that of civilians and civilian objects. Therefore, there should be a special status for protection for journalists. Consequently, it is to recommend that in addition to the existing provisions in IHL, a special binding convention, with validity both for IAC and NIAC needs to be adopted.

With regard to the third research question, the analysis of the research has shown that journalists and media facilities are not effectively protected because the *de facto* protection differs significantly from the granted *de jure* protection. This is all the truer for female journalists who are even less protected than journalists in general – both *de jure* and *de facto*. Hence, it is very important to adopt a binding legal framework specifically protecting all journalists and therefore also including special provisions that guarantee the safety of women journalists. The regulations should also provide for an enforcement mechanism. The adoption of a comprehensive international convention on the safety of journalists and protection of free media, both in times of conflict and peace, is the consequent recommendation. This convention should also include an independent body that monitors the implementation of the convention, for instance a committee on the safety of journalists and protection of free media.⁴⁰⁰ Member states should be obliged to hand in periodical reviews on the national situation, which are reviewed by the committee. Moreover, there is a need for a communications procedure, which allows individuals and civil societies to submit complaints regarding specific rights violations to fight the pervasive impunity of attacks against journalists and media facilities.

⁴⁰⁰ This recommendation for a convention including an independent body and its competences is inspired by the UN Convention on the Rights of the Child and the Committee on the Rights of the Child, UNGA, entry into force 2 September 1990, 1577 *UNTS* 3, available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed 13 November 2018. See for an overview of the competences of the committee: <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>, accessed 13 November 2018.

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